2007

No. ____

In the Supreme Court of the United States

TIMOTHY HURDLE and CHESTER HURDLE,
Petitioners,

v.

R.J. REYNOLDS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners Timothy Hurdle and Chester Hurdle are children of a slave. In May 2002, pursuant to California Insurance Code sections 13810-13813 (Slavery Era Insurance Policies) enacted in 2000, several corporations, including defendants Aetna and New York Life disclosed that they or their predecessors were involved in slavery. Pursuant to California Business and Professions Code (Bus. & Prof. Code) sections 17200, *et seq.* (Unfair Competition Law—UCL), on September 10, 2002, petitioners filed a civil action in the Superior Court for the State of California in San Francisco against 10 corporations (*Hurdle v. FleetBoston*) seeking disgorgement of profits obtained from unlawful, unfair, or fraudulent business acts. The UCL allowed a private plaintiff, who suffered no injury, to obtain relief for others. California case law provided if removal defeated standing because the plaintiff did not meet U. S. Constitution Article III, Section 2 requirements, the case must be remanded to the state court. Without service of the complaint, three defendants—Aetna, New York Life, and FleetBoston—caused the action to be removed to the U.S. District Court for Northern California in San Francisco and caused the Judicial Panel on Multidistrict Litigation to consolidate the case with eight other cases in the U.S. District Court for Northern Illinois in Chicago. On January 26, 2004, the consolidated cases—*In re African-American Slave Descendants Litigation*—were dismissed by the lower court for lack of standing and expiration of the statute of limitations. On December 13, 2006, the Seventh Circuit Court of Appeals affirmed the district court except it reversed dismissal of the consumer protection claims and remanded the case to the district court with respect to complaint allegations of violation of state fraud or consumer protection law, *i.e.*, "consumers' being deceived because sellers have concealed

a material fact." Appendix 16a. At every stage of the proceedings, the Hurdles argued that unlike the cases with which their case had been consolidated, they did not have the problem of standing or statute of limitations because their case was based on California law. Amazingly, the issues in the Hurdle complaint based on California law were not addressed.

Did petitioners receive due process under the Fifth Amendment to the Constitution of the United States where neither the Seventh Circuit nor the District Court for Northern Illinois addressed the petitioners' separate complaint and separate issues, in particular, the issues of standing and statute of limitations based on California law?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiffs-Appellants: Timothy Hurdle (deceased April 2005) and Chester Hurdle. Three appeals from *In Re African-American Slave Descendants Litigation* were consolidated. Petitioners' appeal was captioned *Timothy Hurdle, et al. v. R.J. Reynolds, et al.*, No. 05-3305.

Defendants-Respondents: FleetBoston Financial Corporation (succeeded by Bank of America Corp.), Aetna, Inc., New York Life Insurance Company, R. J. Reynolds, Canadian National Railway Co., Lloyds of London and (The Society of Lloyd's).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on December 13, 2006.

OPINIONS BELOW

The Order, dated December 13, 2006, of the U. S. Court of Appeals for the Seventh Circuit denying appellants' motion to recuse the panel is reproduced at Appendix A.

The opinion of the U. S. Court of Appeals for the Seventh Circuit, dated December 13, 2006, is reported at 471 F.3d 754 and 2006 U.S.App.LEXIS 30525 and is reproduced at Appendix B.

The Opinion and Order of the U. S. District Court for the Northern District of Illinois, Chicago Division, dated January 26, 2004, is reported at 304 F.Supp.2d 1027 and 2004 U.S.Dist. LEXIS 872 and is reproduced at Appendix C.

The Order, dated July 12, 2004, of the U.S. Court of Appeals for the Seventh Circuit is reproduced at Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 13, 2006. This petition is timely under 28 U.S.C. section 2101(c) and Rules of the Supreme Court of the United States, Rules 13.1 and 13.5 because it is filed within 90 days of the entry of the opinion and judgment sought to be reviewed and a 60-day extension of time granted by this court. This court has

jurisdiction over this matter pursuant to 28 U.S.C. section 1254(1).

RELEVANT STATUTORY PROVISIONS

United States Constitution, Amendment V

> No person shall ... be deprived of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

Petitioners Timothy Hurdle, who died in April 2005, and Chester Hurdle ("the Hurdles") are the sons of a slave, Andrew Jackson Hurdle. Andrew Jackson Hurdle had 25 children in two marriages. Timothy, Chester, and their sister Ina (who was a plaintiff in one of the other consolidated cases) were the youngest children of their father's second marriage. Timothy and Chester were young boys when their father died. They recall spending time with their father and hearing stories about his and his five siblings being sold to White families in North Carolina in 1854.

Initially, the Hurdles filed *Hurdle, et al. v. American International Group, et al.* N.D. Cal. No. C024170 on September 3, 2002, which was nearly identical to the other cases in the consolidated *In re African-American Slave Descendants Litigation,* 02 CV 7764; it was voluntarily dismissed without prejudice on November 6, 2002.

In May 2002, pursuant to Insurance Code sections 13810-13813, several insurance companies, including defendants Aetna and New York Life made disclosures regarding their or their predecessors' involvement in slavery. *See* California Department of Insurance Slavery Era Insurance Registry's

website http://www.insurance.ca.gov/0100-consumers/0300-public-programs/0200-slavery-era-insur.

On September 10, 2002, the Hurdles filed *Hurdle v. FleetBoston, et al.* Civil No. 412388. ("Hurdle complaint") in the Superior Court in San Francisco. The state court action was against 10 corporate defendants who profited from American slavery. It was brought on behalf of the Hurdles' enslaved father Andrew Jackson Hurdle, all enslaved Africans, all descendants of enslaved Africans, and the general public for restitution of unjust profits, and it sought an accounting of the illegal profits at issue. The action was based on Bus. & Prof. Code sections 17200, *et seq.* (Unfair Competition Law—UCL) which allowed an individual to sue a business for disgorgement of profits obtained unfairly, illegally, or by fraudulent activities without their having to show direct injury; Insurance Code sections 13810-13813 (Slavery Era Insurance Policies) enacted in 2000 to require insurance companies doing business in California to disclose their or their predecessors' involvement with slavery; and Education Code section 92615, enacted in 2000, requested the Regents of the University of California to assemble a colloquium of scholars to draft a research proposal to analyze the economic benefits of slavery that accrued to owners and businesses.

When petitioners filed their lawsuit, California Bus. & Prof. Code section 17203 permitted a court to enjoin any person who engaged or proposed to engage in unfair competition, and 17204 allowed an individual to sue for relief pursuant to the chapter on behalf of others without having to show direct injury by the corporate defendant in providing:

> Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent

> jurisdiction by the Attorney General or any district attorney or by any county counsel ... or by any person acting for the interests of itself, its members or the general public.

The California state case was not served, but courtesy copies of the complaint were mailed to defendant FleetBoston's president and CEO. On September 25, 2002, three of the 10 defendants—FleetBoston, New York Life, and Aetna—removed the state court case to the U.S. District Court for the Northern District of California in San Francisco. Defendants contended that the removal was based on 28 U.S.C. section 1441(b) in that (i) the action is a civil action between citizens of different states and the matter in controversy exceeded $75,000 and (ii) the claims asserted arose under the United States Constitution and the laws of the United States. Defendant's removal was based on diversity and a federal question. The Hurdles' complaint was based on state statutes that were not preempted by any federal law or the United States Constitution. The case was not based on federal common law. It was not based on a federal question in that no part of petitioners' lawsuit was based on the Constitution, laws, or treaties of the United States. *See Moore's Manual: Federal Practice and Procedure*, Vol. 1, Chapter 5 Sections 5.03 and 5.10. (2002).

On October 10, 2002, three defendants filed a Motion to Stay proceedings in the California District Court. Although the Hurdles filed a Motion to Remand (28 USC Section 1447), on October 18, 2002, the U.S. District Court for the Northern District of California granted defendants' Motion to Stay on November 5, 2002.

On October 18, 2002, defendant Aetna filed a notice of a tag-along case with the Judicial Panel on Multidistrict

Litigation, and on January 7, 2003, the judicial panel entered a Conditional Transfer Order transferring the Hurdles' case from California to the U.S. District Court for the Northern District of Illinois for the reason that it "involves questions of fact which are common to the actions [six other cases] previously transferred to the Northern District of Illinois." (*In Re African-American Slave Descendants Litigation, Timothy Hurdle, et al. v. FleetBoston Financial Corp., et al.*, N.D. California, C.A. No. 3:02-4653, Jan. 7, 2003.) The Hurdles filed a Motion to Vacate Conditional Transfer Order with supporting papers on February 6, 2003 contending that while the various cases dealt with the topic of damages for American slavery, the issues in the California case were different. There was no substantial overlap between the facts in the California Case and the other MDL Cases.

On April 14, 2003, the Judicial Panel on Multidistrict Litigation ordered the Hurdles' case transferred from California to the Northern District of Illinois. On June 17, 2003, all plaintiffs, except the Hurdles, filed a First Consolidated and Amended Complaint in the District Court for the Northern District of Illinois. On July 18, 2003, defendants filed Motions to dismiss the First Consolidated and Amended Complaint and the Hurdles' First Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). On September 4, 2003, in the District Court for the Northern District of Illinois, by agreement between the parties, the Hurdles filed an Unopposed Motion to Reinstate Motion for Remand; Opposition and Reply briefs were filed.

On January 26, 2004, the District Court for the Northern District of Illinois entered an Order granting Defendants' Joint Motion to Dismiss and denying Plaintiffs' Motion for the Court's Recusal. The decision did not mention the issues raised in the Hurdle complaint, particularly those based on

California law. The court recessed so counsel could have an opportunity to review its 75-page opinion. Before the recess, the Hurdles' counsel, Barbara K. Ratliff, made several attempts to address the court to inquire about the status of the Motion to Remand. Ms. Ratliff raised her hand and stood and said that there was another motion. The judge ignored Ms. Ratliff and walked out of the courtroom. For the appeal to the Seventh Circuit, Ms. Ratliff filed her affidavit and that of three witnesses in attendance at the hearing to support an appellate claim of judicial misconduct in the judge's refusal to recognize her.

On February 9, 2004, the Northern District of Illinois granted plaintiffs until April 5, 2004 to file an additional Consolidated Amended Complaint. Since the district court had not addressed the California issues in the Hurdle complaint, rather than joining the Second Amended Consolidated Complaint, on February 24, 2004, the Hurdles filed their first appeal of the court's January 26, 2004 Order to the Seventh Circuit Court of Appeals—*Hurdle v. FleetBoston,* USCA Docket Sheet No. 04-1477.

The July 12, 2004 Order from the Seventh Circuit ordered the parties to file memoranda stating why the appeal in *Hurdle v. FleetBoston,* No. 04-1477 should not be dismissed because issues in the Hurdle complaint were still before the court and the court had made no reference to the claims raised therein:

> Contrary to this court's order of April 6, 2004, it does not appear that the district court issued an order regarding the complaint filed by plaintiffs Chester and Timothy Hurdle (case no. 03-C-2644), hereinafter the "*Hurdle* complaint").

> A review of the papers filed in the district court reveals that the court had before it two complaints, the "First Consolidated and Amended Complaint" and the *Hurdle* complaint. While the "Joint Motion of Defendants to Dismiss the First Consolidated and Amended Complaint" also sought dismissal of the *Hurdle* complaint, see fn. 1 of the defendants' motion, the district court's order of January 26, 2004, *makes no reference to the Hurdle complaint and the claims raised in that complaint*. Further, it appears that the *Hurdle* complaint is separate from the "First Consolidated and Amended Complaint"; the two complaints were not consolidated for all purposes. See *E.E.O.C. v. Harris Chernin, Inc.*, 10 F.3d 1286, 1289 (7th Cir. 1993). (Emphasis added.) Appendix 109a.

On March 8, 2005, the Seventh Circuit dismissed the first appeal in *Hurdle v. FleetBoston* stating essentially that it was premature. On July 6, 2005, the District Court for the Northern District of Illinois granted defendants' Motion to Dismiss plaintiffs' Consolidated Amended Complaint in which the Hurdles did not participate, and on July 11, 2005, it entered a Minute Entry terminating *Hurdle v. FleetBoston*.

On August 5, 2005, the Hurdles filed the second Notice of Appeal to the Seventh Circuit Court of Appeal appealing the January 26, 2004 Order and Opinion and the July 11, 2005 Minute Entry terminating *Hurdle v. FleetBoston* (USDC Docket No. 03CV2644); other plaintiffs appealed; and the appeals were consolidated. In the Hurdles' second appeal, the court gave the case the caption *Hurdle v. R. J. Reynolds*.

In its decision of December 13, 2006, the Seventh Circuit affirmed most of the district court's order granting

defendants' Motion to Dismiss for want of standing, and it remanded and reversed dismissal of the consumer protection claims consistent with the opinion. Like the district court, the Seventh Circuit failed to discuss the specific issues in the Hurdle complaint based on California law. The court said the Hurdle complaint is similar to the consolidated complaint and did not require separate treatment:

> The consolidated complaint (the Hurdle complaint is similar, so need not be discussed separately) alleges the following facts, for which we do not vouch, but merely summarize, the complaint having been dismissed before the truth or falsity of the allegations was determined. Appendix 5a.

At the oral argument before the Seventh Circuit, plaintiffs made a verbal and later written motion for the panel to recuse themselves because they refused to explain why the sole African American jurist on the panel sat from the beginning of the calendar and recused herself when *In re African American Slave Descendants Litigation* was called.

All stages of the legal proceedings have been surrounded with unfairness and the appearance of unfairness with each tribunal not addressing the issues based on California law, the district court judge's ignoring petitioners' counsel, and the lone African American jurist recusing herself when this case dealing with African American slavery was called.

At each stage in the legal proceedings, the Hurdles sought a remand to the California state court. In the Motion to Remand in the California District Court, in the Motion to Vacate Conditional Transfer Order, in the reinstated Motion to Remand in the Northern District of Illinois, and in both appeals to the Seventh Circuit, the Hurdles argued that

California case law provided that if removal from the state to a federal court defeated standing because the plaintiff did not meet U.S. Constitution Article III, Section 2 requirements, the case must be remanded to the state court. *Mangini v. R.J. Reynolds Tobacco Co.*, 1992 U.S. Dist. Lexis 9157 at pp 5-6 (U.S.D.C., N.D.Ca. March 1992); *As You Sow v. The Sherwin-Williams Company*, 1993 U.S. Dist. Lexis 18310 (U.S.D.C., N.D.Ca. December 21, 1993); *Levy v. The Dial Corporation*, 1997 U.S. Dist. Lexis 21398 at p. 5 (U.S.D.C., N.D.Ca. September 10, 1997); *Lee v. American National Insurance Company*, 2001 U.S. App. Lexis 17690 at p. 6 (USCA 9th Cir. August 8, 2001); *Mortera v. North America Mortgage*, 2001 U.S. Dist. Lexis 16728 at p. 4 (U.S.D.C. N.D.Ca. October 9, 2001).

REASONS FOR GRANTING THE PETITION

A. The Proceedings Below Denied Petitioners Due Process as Guaranteed by the Fifth Amendment to the U. S. Constitution

The Seventh Circuit Court of Appeals did not address the essential issue of petitioners' appeal which was the district court did not address the Hurdles' separate complaint based on California law. This conduct denied petitioners the right to be heard and denied them a basic guarantee of the Constitution. *Withrow et al. v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712, 1975 U.S. LEXIS 56 (1975) provides: "A fair trial in a fair tribunal is a basic requirement of due process."

The issues on appeal were:

A. Whether it was error for the district court not to address the separate complaint and separate issues in

the *Hurdle* complaint, in particular, the issues of standing and statute of limitations based on California state law, when it granted Defendants' Joint Motion to Dismiss the First Consolidated and Amended Complaint on January 26, 2004?

B. Whether the district court committed error in not considering the Hurdle Motion for Remand reinstated in the District Court for the Northern District of Illinois on or about September 04, 2003?

C. Whether the district court committed error in not granting the Hurdle Motion for Remand reinstated in the district court on or about September 04, 2003?

D. Whether the District Court committed judicial misconduct or actual prejudice in refusing to recognize the Hurdles' attorney at the January 26, 2004 Status Hearing?

The first appeal of *Hurdle v. FleetBoston* to the Seventh Circuit was dismissed for being premature; however, the court recognized that the issues in the Hurdles' separate complaint had not been addressed by the district court, stating: "...the district court's order of January 26, 2004, makes no reference to the Hurdle complaint and the claims raised in that complaint."

At one point during the oral argument for this matter on September 27, 2006, one of the justices asked rhetorically, "Should the Hurdle case be here?"

Had the Hurdle case remained in the California state court, California Rules of Court, Rule 3.714 would have required its conclusion within 24 months of its September 10,

2002 filing. Rule 3.714(b) provides case disposition time goals:

> (b) Civil case disposition time goals
>
> Civil cases assigned for review under the case management rules in chapter 3 of this division should be managed so as to achieve the following goals:
>
> (1) *Unlimited civil cases*
>
> The goal of each trial court should be to manage unlimited civil cases from filing so that:
>
> (A) 75 percent are disposed of within 12 months;
> (B) 85 percent are disposed of within 18 months; and
> (C) 100 percent are disposed of within 24 months.

For nearly five years, the Hurdle case has been denied resolution of the issues based on California law. In the meantime, in November 2004, Proposition 64 changed Bus. & Prof. Code section 17204 so that a plaintiff has to show direct injury by defendant. Although California Constitution Article 2, section 10 and Article 18, section 4 provide the effective date of the referendum "takes effect the day after the election unless the measure provides otherwise," in July 2006, the California Supreme Court held that Proposition 64 was retroactive. *Californians for Disability Rights v. Mervyn's*, 39 Cal 4th 223, 2206 Cal LEXIS 8774 (July 24, 2006). In *Branick v. Downey Savings and Loan Association,* 39 Cal 4th 235, 2006 Cal LEXIS 8775 (July 24, 2006) the California Supreme Court concluded that "Proposition

64 does not expressly or implicitly forbid the amendment of complaints to substitute new plaintiffs [who have suffered injury in fact and have lost money or property as a result of unfair competition or false advertising]... 'Leave to amend a complaint is entrusted to the sound discretion of the trial court.'"

B. Petitioners Require the Supreme Court to Exercise its Supervisory Power

The failure of the Seventh Circuit and other federal proceedings to address California state law in the Hurdle complaint denied petitioners of due process. This conduct as described above "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." Rules of the Supreme Court of the United States, Rule 10(a); *McNabb v. United States,* 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, 1943 U.S. LEXIS 1280 (1943).

C. The Seventh Circuit's Decision is in Conflict With Its Order in an Earlier Appeal in the Same Case

In the first *Hurdle v. FleetBoston* appeal, the Seventh Circuit stated in its order of July 12, 2004:

> ...the district court's order of January 26, 2004, *makes no reference to the Hurdle complaint and the claims raised in that complaint.* Further, it appears that the *Hurdle* complaint is separate from the "First Consolidated and Amended Complaint".... (Emphasis added.) Appendix 109a.

In the December 13, 2006 decision, the Seventh Circuit said:

> The consolidated complaint (the Hurdle complaint is similar, so need not be discussed separately).... Appendix 5a.

At the oral argument on September 27, one of the justices rhetorically asked if the Hurdle case should have been there.

D. Resolution of This Case has Importance Beyond the Petitioners in This Case

Because slavery legally ended in 1865, problems in cases seeking redress for American slavery have been standing and statute of limitations. It is undisputed that slavery in America was one of the most evil, horrendous acts in the history of mankind. For millions of African Americans, where there has been no positive intervention, the negative effects of slavery have been transferred generationally—from family to family. As a result of a pattern of racism, in every American institution—employment, business, education, housing, criminal justice, media, health, and environment—African Americans trail Whites and other ethnic groups. Not only have these corporate defendants benefited from slavery, but everyone who comes to America benefits from the highly sought after opportunity created by 250 years (1619-1865) of unpaid labor and 100 years (1865-1965) of legal discrimination.

In 2000, California passed legislation requiring insurance companies to disclose their involvement with slavery and to determine economic benefits of slavery that accrued to owners and businesses. The fact that California enacted statutes in the Insurance Code and the Education Code indicates that

slavery is a matter that the state is addressing. Since 2000, defendants, other corporations, universities, and churches have disclosed their involvement with slavery. Only in 2007, have states begun to apologize for slavery. Several cities, including Los Angeles and Chicago have passed resolutions requiring businesses to disclose their ties with slavery.

Because the Hurdle case, based on California law, did not have the problems of standing and statute of limitations, it is a case that has the promise of obtaining redress for slavery that can affect numerous people. With an amendment to the complaint in state court to show direct injury to the petitioners or to others, some redress can be obtained.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted, and this case should be remanded to the Superior Court for the State of California in San Francisco.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 05-3265, 05-3266, 05-3305

[Filed December 13, 2006]

IN RE: AFRICAN-AMERICAN SLAVE DESCENDANTS LITIGATION.

Charles R. Norgle, Sr., *Judge.*

ORDER

The appellants have moved the members of the panel to recuse ourselves from this case on the ground that the court has not explained why a member of the court who sat on other cases heard the same day as this case did not sit in this case. That lack of explanation is not a basis for disqualifying the panel that heard the case. Panels are randomly assigned and composed and ordinarily hear all the cases scheduled for a particular day, but sometimes a judge recuses himself or herself from a particular case, ordinarily without any explanation to the other judges or to the public. The fact that a panel does not demand an explanation–which would be an extraordinary action–cannot reasonably be thought a sign of bias, requiring the panel to recuse itself. If the appellants wish to challenge the lack of transparency in recusals, that is their privilege, but it is not a basis for requiring other judges to

recuse themselves on the ground that the lack of transparency conceals some impropriety.

The motion to recuse is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 05-3265, 05-3266, 05-3305

[Filed December 13, 2006]

IN RE: AFRICAN-AMERICAN SLAVE DESCENDANTS LITIGATION. APPEALS OF: DEADRIA FARMER-PAELLMANN, et al., and TIMOTHY HURDLE, et al.

Before EASTERBROOK, Chief Judge, and POSNER and MANION, Circuit Judges.

POSNER, *Circuit Judge*. Nine suits were filed in federal district courts around the country seeking monetary relief under both federal and state law for harms stemming from the enslavement of black people in America. A tenth suit, by the Hurdle group of plaintiffs, makes similar claims but was filed in a state court and then removed by the defendants to a federal district court. The Multidistrict Litigation Panel consolidated all the suits in the district court in Chicago for pretrial proceedings. 28 U.S.C. § 1407. Once there, the plaintiffs (all but the Hurdle plaintiffs, about whom more shortly) filed a consolidated complaint, and since venue in Chicago was proper and in any event not objected to by the parties (other than the Hurdle group, whose objection we consider later in the opinion), the district court was unquestionably authorized, notwithstanding *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 28,

118 S. Ct. 956, 140 L. Ed. 2d 62 (1998), to determine the merits of the suit. *In re Carbon Dioxide Industry Antitrust Litigation,* 229 F.3d 1321, 1325-27 (11th Cir. 2000); *cf. Neirbo Co. v. Bethlehem Shipbuilding Corp.,* 308 U.S. 165, 167-68, 60 S. Ct. 153, 84 L. Ed. 167 (1939).

We are also persuaded that a district court to which a case is transferred under section 1407 can rule on a motion to dismiss the case even if the plaintiff has not agreed to let the court decide the merits. *In re Phenylpropanolamine (PPA) Products Liability Litigation,* 460 F.3d 1217, 1230-31 (9th Cir. 2006); 15 Charles W. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3866 (2006). While it is true that the Supreme Court held in the *Lexecon* case that a transfer under section 1407 does not authorize the district court to retain the case for trial, the Court left open the question whether pretrial proceedings, which *are* the business (the exclusive business) of the transferee court, include rulings on dispositive pretrial motions, such as motions to dismiss. But the Court hinted that they do include them. Section 1407(a) states that "each action so transferred [by the multidistrict litigation panel] shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." Concerning this "provision of § 1407(a) limiting the Panel's remand obligation to cases not 'previously terminated' during the pretrial period," the Court remarked that "this exception to the Panel's remand obligation indicates that the Panel is not meant to issue ceremonial remand orders in cases *already* concluded by summary judgment, say, or dismissal," 523 U.S. at 37 (emphasis added)--implying that the transferee court can indeed decide the entire case at the pretrial stage.

And rightly so. The duty to conduct the pretrial proceedings in a multidistrict litigation entails the transferee court's ruling on a host of pretrial motions, many of which, whether or not formally dispositive, can shape the litigation decisively. There is no reason to exclude from the court's authority rulings on motions to dismiss–especially a motion to dismiss on the ground that there is no federal jurisdiction. It would be odd to require a court to transfer a case to another federal court when it was apparent that neither court had jurisdiction over the case.

Were it not for the Hurdle suit, we wouldn't have to decide whether the district judge could have dismissed the transferred suits had the parties not agreed, by filing a new complaint, to his retaining them after completion of pretrial proceedings. But the Hurdle plaintiffs did not agree, so we cannot duck the question.

The suits are a series of mostly identical class actions on behalf of all Americans descended from slaves with whom one or more of the defendants or their corporate predecessors may have been directly or indirectly involved. The consolidated complaint (the Hurdle complaint is similar, so need not be discussed separately) alleges the following facts, for which we do not vouch, but merely summarize, the complaint having been dismissed before the truth or falsity of the allegations was determined.

The defendants are companies or the successors to companies that provided services, such as transportation, finance, and insurance, to slaveowners. At least two of the defendants *were* slaveowners; the predecessor of one of the bank defendants once accepted 13,000 slaves as collateral on loans and ended up owning 1,250 of them when the borrowers defaulted, and the predecessor of another defendant ended up

owning 346 slaves, also as a consequence of a borrower's default. Even before the Thirteenth Amendment, slavery was illegal in the northern states, and the complaint charges that the defendants were violating the laws of those states in transacting with slaveowners. It also claims that there were occasional enslavements long after the passage of the Thirteenth Amendment and that some of the defendants were complicit in those too. By way of relief, the complaint seeks disgorgement to the class members of the profits that the defendants obtained from their dealings with slaveowners.

The legal basis for the plaintiffs' federal claim is 42 U.S.C. § 1982, which provides that "all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." *See City of Memphis v. Greene,* 451 U.S. 100, 119-20, 101 S. Ct. 1584, 67 L. Ed. 2d 769 (1981); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968). A claim based on a federal statute invokes the federal-question jurisdiction of the federal courts. But since most of the conduct of which the plaintiffs complain occurred prior to the passage of the Thirteenth Amendment, and indeed prior to the Civil War, section 1982 does not provide a sturdy basis for the retention of federal jurisdiction over the plaintiffs' nonfederal claims. A frivolous federal law claim cannot successfully invoke federal jurisdiction. *Hagans v. Lavine,* 415 U.S. 528, 536-37, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974); *Turner/Ozanne v. Hyman/Power,* 111 F.3d 1312, 1317 (7th Cir. 1997); *Crowley Cutlery Co. v. United States,* 849 F.2d 273, 276-77 (7th Cir. 1988); *Lovern v. Edwards,* 190 F.3d 648, 654-55 (4th Cir. 1999). So it cannot provide a perch on which to seat nonfederal claims in the name of the federal courts' supplemental jurisdiction, 28 U.S.C. § 1367.

And very few of the plaintiffs *have* a nonfrivolous claim under section 1982.

But with one exception, all the nonfederal claims are within the federal diversity jurisdiction and so do not require a federal-law handle. The exception is Richard E. Barber, Sr.'s suit; for both he and Brown Brothers, one of the defendants in his suit, are citizens of New Jersey. Since he thus cannot invoke diversity as a basis for federal jurisdiction and does not have a colorable section 1982 claim (in fact he makes no section 1982 claim at all), his suit must be dismissed for want of federal jurisdiction without regard to the other challenges that the defendants mount to federal jurisdiction over these suits.

The district judge ruled that by virtue of both the political-question doctrine and the requirement of standing to sue derived from Article III of the Constitution, there was no federal jurisdiction over any of the suits and that in any event they had no merit because the applicable statutes of limitations had lapsed and anyway the complaint failed to state a claim. 375 F. Supp. 2d 721 (N.D. Ill. 2005). The dismissal was with prejudice. But if the judge was correct that there is no jurisdiction, he should have dismissed the suits without prejudice and thus not decided their merits.

The political-question doctrine bars the federal courts from adjudicating disputes that the Constitution has been interpreted to entrust to other branches of the federal government. The earliest and still the best example is *Luther v. Borden,* 48 U.S. (7 How.) 1, 12 L. Ed. 581 (1849). Rhode Island had not adopted a new constitution after the break with England, but instead continued to govern itself under its colonial charter. Restive citizens convened a constitutional convention not authorized by the charter. The convention

adopted a new constitution to which the charter government refused to submit, precipitating rebellion and the establishment in 1842 of a rival state government. The Supreme Court refused to decide which of the two competing governments was the legitimate one. It would have been exceedingly difficult to gather and assess, by the methods of litigation, the facts needed for such a decision. *Id.* at 41-42. It would have been even more difficult to formulate a legal concept of revolutionary legitimacy to guide the decision. Formulating and enforcing a remedy would have presented additional stumbling blocks. The case simply exceeded judicial capabilities. So the Court left the matter to the President, to whom Congress had delegated the duty of resolving it. *Id.* at 43; *see also Ohio ex rel. Bryant v. Akron Metropolitan Park District,* 281 U.S. 74, 79-80, 50 S. Ct. 228, 74 L. Ed. 710 (1930); *Pacific States Telephone & Telegraph Co. v. Oregon,* 223 U.S. 118, 133-50, 32 S. Ct. 224, 56 L. Ed. 377 (1912).

A case that sought reparations for the wrong of slavery would encounter similar obstacles, but the plaintiffs have been careful to cast the litigation as a quest for conventional legal relief. All they are asking the federal judiciary to do is to apply state law (plus the one federal statute, 42 U.S.C. § 1982) to the defendants' conduct. They face, of course, formidable obstacles, quite apart from the severely limited applicability of section 1982. To name just one of those obstacles, it is highly unlikely that antebellum laws in northern states were intended to confer financial or other benefits on the twenty-first century descendants of slaves. But the obstacles to the vindication of the plaintiffs' legal claims have the form at least of conventional defenses to a lawsuit. If one or more of the defendants violated a state law by transporting slaves in 1850, and the plaintiffs can establish standing to sue, prove the violation despite its antiquity,

establish that the law was intended to provide a remedy (either directly or by providing the basis for a common law action for conspiracy, conversion, or restitution) to lawfully enslaved persons or their descendants, identify their ancestors, quantify damages incurred, and persuade the court to toll the statute of limitations, there would be no further obstacle to the grant of relief.

But we think that the district court was correct, with some exceptions to be noted, in ruling that the plaintiffs lack standing to sue. It would be impossible by the methods of litigation to connect the defendants' alleged misconduct with the financial and emotional harm that the plaintiffs claim to have suffered as a result of that conduct. *See generally* James R. Hackney, Jr., *"The Jurisprudence of Slavery Reparations: Ideological Conflict, African American Reparations, Tort Causation, and the Case for Social Welfare Transformation,"* 84 B.U. L. Rev. 1193 (2004). For example, Aetna is alleged to have written several insurance policies on slaves in the 1850s in violation of state law applicable to the company, and to have obtained premiums from the insureds–the slaveowners–that (we'll assume) exceeded the cost of the insurance to Aetna (its expenses plus the payment of proceeds if the insured event came to pass). The plaintiffs argue that Aetna's net income from this insurance was a wrongful profit that the company should be ordered to restore to the plaintiff classes.

If the insurance business was competitive back then (and the plaintiffs do not argue that it was not), Aetna did not profit in an economic sense from the transactions of which the plaintiffs complain (its "profit" would just be its cost of equity capital), and in any event it would have distributed any profits from the transactions to its share-holders long ago. All that to one side, there is a fatal disconnect between the victims

and the plaintiffs. When a person is wronged he can seek redress, and if he wins, his descendants may benefit, but the wrong to the ancestor is not a wrong to the descendants. For if it were, then (problems of proof to one side) statutes of limitations would be toothless. A person whose ancestor had been wronged a thousand years ago could sue on the ground that it was a continuing wrong and he is one of the victims.

The plaintiffs introduce another claim of injury by asserting that had the defendants refused to violate their own states' laws by doing business with slaveowners, there would have been less slavery because the refusal would have been tantamount to subjecting the slaveowners to a partial boycott. That would have raised their costs, and, by making slavery less profitable, might have reduced the amount of it. ("Might," not "would," because the higher costs might simply have depressed the price of a slave.) And had there been less slavery, the argument continues, some of the ancestors of the members of the plaintiff classes would not have been slaves, but instead free laborers, and they would have had some disposable income part of which they might have saved rather than spent, and left to their heirs.

But this causal chain is too long and has too many weak links for a court to be able to find that the defendants' conduct harmed the plaintiffs at all, let alone in an amount that could be estimated without the wildest speculation. It is impossible to determine how much, if any, less slavery there would have been had the defendants not done business with slaveowners, what effect a diminution of slavery would have had on bequests by ancestors of the class members, and how much of the value of those bequests would have trickled down to the class members.

Suppose a class member could prove that he was descended from one of the slaves insured by Aetna or transported by the Union Pacific Railroad (another defendant) or bought with money lent to the buyer by the predecessor of the JPMorgan Chase Bank (still another defendant), and that these transactions were illegal and that the descendants of slaves are among the people whom the laws were intended to protect. Had he not been insured or transported or bought with a bank loan, how would the financial welfare of his remote descendant be affected? Would this ancestor have been freed, or perhaps never enslaved in the first place? As the plaintiffs stress, slavery was profitable; is it conceivable that slave-holders would have been unable to insure, transport, and finance the purchase of slaves if northern companies had been excluded from the provision of these services or had refused to violate their states' laws that sought to keep them from providing the services?

Even if compliance with those laws would have curtailed slavery and even if it could be shown (it could not be) that as a result of that hypothetical curtailment a plaintiff's remote ancestor would not have been a slave but instead a free laborer, how could the wages that the ancestor would have earned as a free laborer be shown to have influenced the wealth of his remote descendant? Economists actually study such issues, under the rubric of "intergenerational mobility," *see, e.g.*, Kerwin Kofi Charles & Erik Hurst, *"The Correlation of Wealth Across Generations,"* 111 J. Pol. Econ. 1155 (2003); Keith N. Hylton, *"The Jurisprudence of Slavery Reparations: Slavery and Tort Law,"* 84 B.U. L. Rev. 1209, 1239-41 (2004), but these are studies of aggregate effects, not of the effects of particular acts, affecting particular individuals, on the wealth of specific remote descendants. There is no way to determine that a given black American today is worse off by a specific, calculatable sum of money

(or monetized emotional harm) as a result of the conduct of one or more of the defendants.

Nor are the problems of measuring and tracing elided by recasting the relief sought as restitution rather than damages. Restitution–the transfer of the wrongdoer's gain to his victim–is an alternative to damages, the monetization of the victim's loss. *ConFold Pacific, Inc. v. Polaris Industries,* Inc., 433 F.3d 952, 957-58 (7th Cir. 2006); *Charter Communications Entertainment I, DST v. Burdulis,* 460 F.3d 168, 182 (1st Cir. 2006); *Kerr v. Charles F. Vatterott & Co.,* 184 F.3d 938, 944 (8th Cir. 1999); 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 4.1, pp. 551, 555 (2d ed. 1993). It is a sensible remedy for egregious misconduct because it makes the conduct worthless to the defendant by taking away his profit even if it exceeds the loss to the plaintiff. But it presupposes an injury–it is a remedy for a legal wrong–and there is no way in which to determine what if any injury the defendants inflicted on the members of the plaintiff classes.

And again, if there were a legal wrong, it would not be a wrong to any living persons unless they were somehow the authorized representatives to bring suits on behalf of their enslaved ancestors. With some exceptions to be noted, the plaintiffs are suing to redress harms to third parties (their ancestors), without being authorized to sue on behalf of those parties. It is like a suit by a descendant of a Union soldier, killed in battle, against a Civil War era gun manufacturer still in business that sold guns to the Confederacy in violation of federal law. A federal court could not entertain the suit because the plaintiff would be unable to prove a harm to an interest of his (such as his bank account) that the law protects. *E.g., Raines v. Byrd,* 521 U.S. 811, 818-19, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997); *Sierra Club v. Morton,* 405 U.S. 727, 739-40, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). It is

possible that had the ancestor not died when he did he would have become a wealthy person and left bequests so immense that his remote descendant, the plaintiff, would have inherited more money from his parents or grandparents than he actually did. But that is too speculative an inquiry to provide a basis for a federal suit. *See McConnell v. FEC,* 540 U.S. 93, 225-26, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003); *Branton v. FCC,* 301 U.S. App. D.C. 244, 993 F.2d 906, 909 (D.C. Cir. 1993).

The two cases just cited, and others, treat remoteness as a limitation on Article III standing. Still other cases treat it as a nonjurisdictional limitation on who may sue in federal court--but still a limitation. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-69, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992); *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 476-77, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982); *Israel Travel Advisory Service, Inc. v. Israel Identity Tours,* Inc., 61 F.3d 1250, 1257 (7th Cir. 1995); *Allegheny General Hospital v. Philip Morris, Inc.,* 228 F.3d 429, 435 (3d Cir. 2000). Another group of cases would deem the suit barred by Article III because one function of the Article III standing doctrine is to prevent parties with slight interests in a litigation from crowding those who have the main interests. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 473, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982); *Morlan v. Universal Guardian Life Insurance Co.,* 298 F.3d 609, 621 (7th Cir. 2002); *Illinois DOT v. Hinson,* 122 F.3d 370, 373 (7th Cir. 1997); *People Organized for Welfare & Employment Rights (P.O.W.E.R.) v. Thompson,* 727 F.2d 167, 173 (7th Cir. 1984); *Abraham v. Intermountain Health Care Inc.,* 461 F.3d 1249, 1268 (10th Cir. 2006). In our hypothetical case of the Union soldier, the litigant with the paramount interest in the case would be his estate and the damages that the estate could

recover would include whatever amount of money he would have wanted his descendant to inherit. If the descendant could sue the tortfeasor directly for that amount (or for the tortfeasor's profit, in a suit for restitution), there would be either double recovery or an impossible task of allocating the monetary recovery between the descendant and the estate.

A few of the plaintiff's claims, however, as we noted at the outset, are claims of subjection to involuntary servitude after it was outlawed by the Thirteenth Amendment, and indeed into the twentieth century. Cain Wall, Sr. claims that "during the time that [he] was enslaved"–which he contends extended into the 1960s–"one or more of the defendants were doing business in Mississippi or Louisiana. Some of the defendants had reason to know of the enslavement of Cain Wall and yet failed to take steps to eliminate same, while they continued to inure benefits from the illegal, but sanctioned system of servitude post-emancipation." But there is no claim that the defendants subjected Wall (or any other class member) to involuntary servitude or did anything to perpetuate or exacerbate his condition. The claim is that they took no steps to free him. The briefs suggest no basis for thinking that there is any kind of Good Samaritan legal duty to eliminate a violation of the Thirteenth Amendment committed by someone else.

The limitations that Article III places on the right to sue in a federal court require us to affirm, on the basis of lack of standing, the greater part of the district court's judgment. But there are three qualifications. First, although most of the plaintiffs and class members are suing as descendants rather than as representatives of their ancestors' estates authorized to sue on those ancestors' behalf, a few do claim to be suing in such a representative capacity. It is highly unlikely that the estate of anyone who died a century or more ago, or indeed

more than half a century ago (for although many former slaves survived into the twentieth century, very few would still have been alive 50 years ago, which is to say in 1956, 91 years after the end of the Civil War), has not yet been closed. But the district judge accepted that the purported representatives had a right to sue on behalf of their ancestors, and the defendants offer only a perfunctory rebuttal. We shall assume without deciding that some of the plaintiffs are legal representatives of their slave ancestors. These plaintiffs not only escape the objection to standing that the suits seek damages for injuries actually suffered by third parties (the ancestors–no longer third parties, but the real parties in interest, merely represented by the plaintiffs), but have less to prove. They just have to prove the injury to the ancestors; the trickle-down question is elided. In all likelihood it would still be impossible for them to prove injury, requiring as that would connecting the particular slavery transactions in which the defendants were involved to harm to particular slaves. But in any event, suits complaining about injuries that occurred more than a century and a half ago have been barred for a long time by the applicable state statutes of limitations. It is true that tolling doctrines can extend the time to sue well beyond the period of limitations–but not to a century and more beyond. Slaves could not sue, and even after the Thirteenth Amendment became effective in 1865 suits such as these, if brought in the South, would not have received a fair hearing. However, some northern courts would have been receptive to such suits, and since the defendants are (and were) northern companies, venue would have been proper in those states. Even in the South, descendants of slaves have had decades of effective access to the courts to seek redress for the wrongs of which they complain. And it's not as if it had been a deep mystery that corporations were involved in the operation of the slave system. *See, e.g.*, Edgar J. McManus, *Black Bondage in the North* 174 (1973); Kenneth

M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* 397 (1956).

The second qualification concerns a claim, rather buried in the complaint but not forfeited, that in violation of state fraud or consumer protection law members of the plaintiff classes have bought products or services from some of the defendants that they would not have bought had the defendants not concealed their involvement in slavery. This claim has nothing to do with ancient violations and indeed would be unaffected if the defendants' dealings with slaveowners had been entirely legal. It is a complaint of consumers' being deceived because sellers have concealed a material fact. The injury is the loss incurred by buying something that one wouldn't have bought had one known the truth about the product.

It is true that under no consumer protection law known to us, whether a special statute or a doctrine of the common law of contracts or torts, has a seller a general duty to disclose every discreditable fact about himself that might if disclosed deflect a buyer. To fulfill such a duty he would have to know much more about his consumers than he possibly could. But the plaintiffs are charging the defendants with misrepresenting their activities in relation to slavery. A seller who learns that some class of buyers would not buy his product if they knew it contained some component that he would normally have no duty to disclose, but fearing to lose those buyers falsely represents that the product does not contain the component, is guilty of fraud. An example would be a manufacturer who represented that his products were made in the United States by companies that employ only union labor, whereas in fact they were made in Third World sweat-shops. *See Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 119 Cal. Rptr. 2d 296, 45 P.3d 243, 248 (Cal. 2003); *Price v. Philip Morris, Inc.*, 219 Ill. 2d

182, 848 N.E.2d 1, 19, 302 Ill. Dec. 1 (Ill. 2005); *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 776 N.E.2d 151, 154-55, 267 Ill. Dec. 14 (Ill. 2002); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1185 (3d Cir. 1993).

We do not offer an opinion on the merits of the consumer protection claims, but merely reject the district court's ruling that they are barred at the threshold.

The third qualification concerns the Hurdle suit and is related to the second qualification. Unlike the other plaintiffs, the Hurdle plaintiffs didn't want to remain in the district court in Chicago. They wanted to return to the California district court from which their case had been transferred to Chicago for pretrial proceedings, when the, 05-3266, 05-3305 pretrial proceedings concluded. Actually they wanted to return to the California *state* court from which the defendants had removed their case to the district court, but that is an issue for that district court to resolve if and when the case is returned. As we pointed out at the beginning of this opinion, the district court, as the transferee court in a transfer pursuant to 28 U.S.C. § 1407, was authorized to rule on a motion to dismiss the Hurdle suit. But though the district judge in the exercise of that power rightly dismissed so much of that suit as attacks wrongs done to the plaintiffs' ancestors, the Hurdle plaintiffs are among the plaintiffs who have consumer protection claims as well. As to them there will be further pretrial proceedings, and they will be conducted in Chicago. So the Hurdle plaintiffs can't go back to California, at least not yet.

To summarize, the district court's dismissal, for want of standing, of all but the claims brought by legal representatives of slaves plus the consumer protection claims is modified to be a dismissal without prejudice, and as so modified is affirmed. (Barber's suit is dismissed, also without prejudice,

for want of diversity.) The dismissal of the claims brought by the plaintiffs who claim to be legal representatives is affirmed, but on the merits (statute of limitations) and so with prejudice. The dismissal of the consumer protection claims is reversed and the case remanded to the district court for further proceedings on those claims consistent with this opinion. The district court is authorized to retain those claims for the duration of the litigation, except in the case of the Hurdle plaintiffs, as to whom the court is authorized only to conduct pretrial proceedings under 28 U.S.C. § 1407.

MODIFIED AND AFFIRMED, IN PART;

REVERSED IN PART AND REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MDL No. 1491, Lead Case No. 02 C 7764

[Filed January 26, 2004]

IN RE AFRICAN-AMERICAN SLAVE DESCENDANTS LITIGATION

JUDGES: CHARLES RONALD NORGLE, Judge, United States District Judge.

OPINION AND ORDER

CHARLES R. NORGLE, District Judge:

Before the court is Defendants' Joint Motion to Dismiss. For the following reasons, the motion is granted.

I. INTRODUCTION

This case arises out of the institution of human chattel slavery as it existed in the North American colonies and the latter-formed United States of America. The allegations in Plaintiffs' First Amended and Consolidated Complaint ("FACC" or "Complaint") retell the generally acknowledged horrors of the institution of slavery, and the malignant actions of the sovereigns, entities and individuals that supported that

institution. Plaintiffs' Complaint asks the courts to reexamine a tragic period in our Nation's history and to hold various corporate defendants liable for the commercial activities of their alleged predecessors before, during and after the Civil War in America. Defendants acknowledge that slavery marked a deplorable period in our Nation's history. However, they assert that Plaintiffs' claims, which arise from that period, cannot be heard in 2004 in a court of law.

II. HISTORICAL OVERVIEW OF SLAVERY IN AMERICA

In essence, Plaintiffs' Complaint is a claim for reparations rooted in the historic injustices and the immorality of the institution of human chattel slavery in the United States. To elucidate the nature of this institution, the court undertakes an analysis, necessarily brief, of the historical events surrounding slavery, including the monumental event that ended the institution of slavery in the United States, the Civil War.

A. A Definition of Slavery

In January of 1865, General William Tecumseh Sherman of the Union forces, along with Secretary of War Edwin Stanton, met with former slaves. Ira Berlin, *Generations of Captivity: A History of African-American Slaves* 2 (2003). The conversation focused on two questions: from the point of view of the freed slave, what was the nature of slavery, and what was the nature of freedom? *Id.* Garrison Frazier, a sixty-seven year old former slave, explained that "slavery . . . is receiving by the *irresistible power* the work of another man, and not by his *consent.*" *Id.* Freedom, Frazier indicated, "is taking us from the yoke of bondage, and placing us where we could reap the fruits of our own labor, take care of ourselves

and assist the Government in maintaining our freedom." *Id.* Frazier's definition reminds us of the essential unfairness of slavery: the slaveowner takes, by sheer violence and force, the slave's freedom and labor in order to place himself at the top of a society's economic hierarchy. *Id.* at 3.

B. A Brief History of Slavery in the New World

While slavery seems to have been a part of human history since the "dawn of civilization," African slave trafficking in the New World began in the year 1502. Robert William Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery* 17-18 (1991). Europeans were historically drawn to Africa for two reasons: gold and slaves. Edward Reynolds, *Stand the Storm, A History of the Atlantic Slave Trade* 28 (1985). Those who journeyed to Africa seeking slaves for the New World sometimes simply kidnapped individuals who appeared before them by happenstance. Herbert S. Klein, *The Atlantic Slave Trade* 103 (1999). However, historical evidence indicates that a great deal (perhaps even the majority) of the slave trade was made possible by African leaders who sold African slaves to European slave traders. *Id.*; *see also* Reynolds, *supra* at 33-46 (providing a detailed explanation of the African slave market, and the economic mechanisms used to facilitate the sale of slaves from local African chiefs to slave traders). Local African leaders acquired these slaves in several different ways: captives were taken in local wars or raids, those imprisoned for crimes or indebtedness were often forced into slavery, and large states would exact slaves as "tribute" from smaller tribes under their control. *See* Klein, *supra* at 117.

Upon their sale to slave traders, slaves were shipped to the New World in what became known as the "Middle Passage." Slaves' heads were shaved, their bodies were branded and

stripped naked, and their ankles were shackled. See Reynolds, *supra* at 47. They were then led into the holds of slave ships, where they were laid down alongside each other for the journey to the New World. *Id.* at 48. The prevalence of disease, lack of sufficient food and water, and constant confinement took its toll, with up to one-quarter of the slaves on any given ship dying during the "Middle Passage." *Id.* at 48-53.

African slaves in the New World were initially sold into small sugar production operations in Brazil, Mexico, Peru, Cuba, Haiti, Jamaica, the British West Indies, and Dutch Guyana. *Id.* at 20-21. Other African slaves were set to work producing such crops as cocoa, coffee, hemp, tobacco and rice. *Id.* at 21. By the 1680s, the small farm with its traditional methods of operation had given way to more efficient means of production, and the concept of the large "plantation" was born. *Id.* at 23. Inefficient methods of farming had been "replaced by large gangs of slaves, working in lock step, and moving methodically across vast fields." *Id.* With this change came an increase in the size of slave operations. By the early part of the 1800s, many plantations in Jamaica and the West Indies contained up to two hundred and fifty slaves. *Id.*

Slavery in North America began more slowly than slavery in South America and the Caribbean. In 1680, there were 7,000 slaves in the British North American colonies. *Id.* at 29. Slavery as an economic institution in North America, however, rapidly gained momentum over the next fifty years. By the 1730s, roughly 120,000 slaves had been brought to the colonies and forced to work in such industries as farming, tobacco production and domestic service. *Id.* By the middle of the 1700s, the institution of slavery in the United States began to concentrate in the Southern states. It was in these states that

plantations emerged, ready to take advantage of the inexpensive labor slaves provided in the production of such crops as tobacco, rice, sugar and cotton. *Id.* at 31.

During the years 1780 to 1810, the rapid expansion of these industries was accompanied by a significant increase in the number of slaves imported from Africa. *Id.* at 32. The increase in the importation of slaves, along with the natural increase in the slave population, soon gave the United States a dubious distinction. By 1825, the population of slaves in the United States was roughly 1,750,000, making the United States the "leading user of slave labor in the new world." *Id.* at 33. Slavery had become the dominant economic force in the Southern United States. Historians cite numerous factors for this development, but it seems that two factors are the most significant. First, slave labor was inexpensive compared to other sources of labor. *Id.* at 34. Second, slave masters in the Southern states were willing to expend an "enormous, almost unconstrained degree of force . . . to transform ancient modes of labor into a new industrial discipline." *Id.* This "new industrial discipline" was based on a division of labor scheme, enforced by brutality, and legally sanctioned.

C. Slavery and American Law

This violent and oppressive system was supported by the United States legal system for a long period of time. Thus slavery was historically more than simply a social and economic institution. It was also an established legal institution.[1] For instance, Article I, Section 9 of the United

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[1] Some Northern state statutes, however, stood firmly in opposition to slavery. *See infra* Part II.E (discussing the Personal Liberty Laws enacted in Northern States).

States Constitution has been traditionally understood to limit Congress' power to regulate slavery.[2] It is thought that this Article meant that Congress was denied the power to regulate the "internal slave trade, leaving only importation from Africa to be prohibited after 1808." Walter Berns, *The Constitution and the Migration of Slaves,* 78 Yale L.J. 198 (1968). Also, in 1850, Congress passed a statute supporting the rights of slaveowners to capture escaped slaves. The Fugitive Slave Act provided that:

> When a person held to service or labor in any State or Territory of the United States, has heretofore or shall hereafter escape into another State or Territory of the United States, the person or persons to whom such labor or service shall be due . . . may pursue and reclaim such fugitive person . . . [and may] take and remove such fugitive person back to the State or Territory whence he or she may have escaped as aforesaid.

The Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850). This Act also provided for fines and/or imprisonment for those who aided escaped slaves, and stipulated that both law enforcement personnel and ordinary citizens were bound by law to aid in the capture of escaped slaves. *Id.* Finally, in the infamous case of *Dred Scott v. Sandford,* Scott, a slave, brought suit to gain his freedom. 60 U.S. 393, 15 L. Ed. 691 (1856). The Supreme Court of the United States held that since Scott was

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[2] "The migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." U.S. Const. art I, § 9, cl. 1.

a "negro, whose ancestors were imported into this country, and sold as slaves," he could not be a citizen of the United States, and hence had no standing to bring suit in a United States court. *Id.* at 403-04.

D. Slavery and Morality

The immorality of the institution of slavery is obvious. However, scholars have attempted to explain exactly what it is about this institution that offends moral sensibilities. Two moral indictments of the institution are significant. First, "slavery permitted one group of people to exercise unrestrained personal domination over another group of people." Fogel, *supra* at 394. The slave was subject to abject cruelty, both physical and psychological, by his or her masters in order for the master to maintain domination. *Id.* In one sense, "the extreme degree of domination required by this system . . . is the essential crime." *Id.* Second, the slave was denied the fruits of his or her labor. *Id.* at 395. Slaves were forced to work physically grueling tasks for very long hours without pay, thus it was impossible for the slave to improve his or her economic position within society. *Id.* The slave simply had no resources or "opportunity . . . to rise on the economic ladder by acquiring land, labor skills, and other forms of capital." *Id.*

E. Slavery as a Cause of the Civil War

Historians have long debated whether slavery was the single driving force behind the regional tensions in the United States that eventually led to the Civil War. "Although some scholars have held that slavery was *the* cause [of the Civil War], others have developed complex analyses that draw distinctions between immediate and ultimate causes and that explore a variety of ways other than war that could have

settled or at least contained the issue of slavery." *Id.* at 411. This much, however, is clear: by 1861, tensions had escalated to the extent that maintaining peace would have required that the Northern states allow the permanent "existence of an independent confederacy dedicated to the promotion of slavery." *Id.* at 413. In other words, by 1861, tensions between the North and the South had increased to such a pitch that the only way slavery would be abolished throughout the entire nation was through armed conflict.

A great deal of the tension between the North and the South had to do with the Northern states' promulgation of Personal Liberty Laws. "In his annual message to Congress of December 3, 1860, James Buchanan warned that the South 'would be justified in revolutionary resistance to the Government of the Union' if northern states did not repeal their Personal Liberty Laws." Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North* 1780-1861 202 (1974). These laws were devised and implemented by many Northern states to make it very difficult for slave owners to capture escaped slaves who had taken up residence in those states.

The court does not claim objective knowledge of the ultimate cause of the Civil War. Certainly, however, tensions marked by the North's moral outrage at the institution of chattel slavery, and the South's indignation at the North's promulgation of Personal Liberty Laws, contributed significantly to the advent of war.

F. The Civil War

Fort Sumter, located in the Charleston harbor, South Carolina, was one of just four Federal fortifications left in Confederate territory. Shelby Foote, *The Civil War, A*

Narrative: Fort Sumter to Perryville 44 (Vintage Books 1986) (1958). In 1861, the government of South Carolina made protests to Washington regarding the presence of a Federal fortification within its borders, but those protests were ignored. *Id.* Instead, Washington decided to reinforce Fort Sumter with men and supplies. *Id.* However, when local gunmen opened fire on a Union steamer attempting to bring these reinforcements to Fort Sumter, the steamer was forced to turn away. *Id.* By March of 1861, Fort Sumter was surrounded by Confederate forces, and was cut off from fresh supplies. *Id.* By April of that year, the Federal forces inside Fort Sumter were in danger of starving to death. *Id.* at 48. The time had come for Washington to make a decision--abandon Fort Sumter or again attempt to resupply it. Washington was aware that another attempt to bring supplies to Fort Sumter might well provoke an attack on the fort itself. *Id.* at 47. This time, however, the attack would not come from local gunmen, but from Confederate forces. *Id.* Washington decided not to cave in to Confederate pressures, and to attempt to bring fresh provisions and reinforcements to the fort. *Id.* at 47. On the morning of April 12, 1861, with Union supply ships within sight of Fort Sumter, the Confederacy fired the first shot of the Civil War. *Id.* at 49.

The four-year Civil War was fought by means of a series of pitched battles, each one seemingly more horrific than the last. The first true battle of the war, the battle of Bull Run, resulted in the deaths of roughly 2,700 Union soldiers and 2,000 Confederate soldiers. *The Price in Blood, Casualties in the Civil War, at* http://www.civilwarhome.com/casualties.htm. Other battles, at places like Wilson's Creek, Spotslyvania, Cold Harbor, and Franklin, Tennessee took the lives of tens of thousands of Union and Confederate soldiers. *Id.* The final campaign of the war, fought in the vicinity of

Appomattox, Virginia, resulted in a combined 17,500 battle deaths. *Id.*

Following the Appomattox campaign, on April 9, 1865, Union General Ulysses S. Grant received Confederate General Robert E. Lee at Appomattox Courthouse, where the two generals agreed upon the terms of Lee's surrender. Shelby Foote, *The Civil War, A Narrative: Red River to Appomattox* 945-51 (Vintage Books 1986) (1974). Shortly thereafter, Grant rode out towards his headquarters, where Union batteries were firing in celebration. *Id.* at 950-51. Grant insisted the batteries stop firing, worried that the noise might spark a skirmish between his troops and the nearby, and still armed, Confederate soldiers. *Id.* at 951. There was, however, another more important reason Grant considered it "unfitting" for his troops to be firing their weapons at that point: "'The war is over,' he told his staff. 'The rebels are our countrymen again.'" *Id.*

All in all, approximately 620,000 Americans died in the Civil War; Union forces fighting to end slavery suffered 360,000 of these deaths. James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 854 (Oxford University Press 1988). There were 178,975 African-American Union troops that fought in the Civil War, and 36,000 of those troops died during the war. *The Price in Blood, Casualties in the Civil War, at* http://www.civilwarhome.com/casualties.htm. An analysis as brief as this cannot do justice to the tremendous sacrifices made by both Union and Confederate soldiers in this war. Since the Civil War, America has been involved in a number of armed conflicts, but the casualties America suffered in the Civil War exceeds the total number of casualties America has suffered in all its other wars. *Id.* The Civil War, the war that ended the institution of chattel slavery in the United States, was truly America's bloodiest war.

G. The Abolishment of Slavery

On January 1, 1863, in the midst of the Civil War, President Abraham Lincoln issued the Emancipation Proclamation. That document reads in part: "I do order and declare that all persons held as slaves within the designated States . . . are, and henceforward shall be free. . . ." Abraham Lincoln, The Emancipation Proclamation, Exec. Proclamation No. 17 (Jan. 1, 1863), *reprinted in* 12 Stat. 1268 (1963).

Following the war, Congress acted to formally abolish slavery by proposing the Thirteenth Amendment to the United States Constitution. That Amendment was ratified on December 6, 1865. Section 1 of that Amendment reads: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1.

Also, the Fourteenth Amendment to the United States Constitution was ratified on July 9, 1868. Section 1 of that Amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside." U.S. Const. amend. XIV, § 1. In effect, the Fourteenth Amendment overruled the *Dred Scott* decision, making freed slaves citizens of the United States.

Following the Civil War, the South was bankrupt, and an estimated four million African-Americans assumed the responsibility of freedom as nationalism emerged. These lingering effects led to the Reconstruction era, a significant period in our Nation's history, which addressed the numerous

issues raised by the abolition of slavery and the war fought to achieve that end.

III. OVERVIEW OF THE PROCEEDINGS

A. Parties

1. *Plaintiffs*

Beginning in 2002, a number of lawsuits were filed by descendants of slaves seeking reparations from private corporations, which were alleged to have unjustly profited from the institution of slavery. On October 25, 2002, the Judicial Panel on Multidistrict Litigation transferred these actions to this court for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. See *In re African-American Slave Descendants Litigation,* No. 1491, 231 F. Supp. 2d 1357 (Jud. Pan. Mult. Lit., Oct. 25, 2002). This litigation presently consists of nine individual lawsuits, and these individual plaintiffs have filed a consolidated complaint. See Pls.' First Amended Consolidated Complaint.[3]

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[3] The citations in this opinion are to the paragraphs as styled in Plaintiffs' Complaint; however, in certain instances the numbering of paragraphs does not proceed in chronological order.

The plaintiffs in these cases include the following: Deadria Farmer-Paellmann,[4] Mary Lacey Madison,[5] Andre Carrington,[6] Richard Barber, Sr.,[7] Hannah Jane Hurdle-Toomey,[8] Marcelle Besteda Porter,[9] Julie Mae Wyatt-Kervin,[10] Emma Marie Clark,[11] Ina Bell Daniels Hurdle

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[4] Farmer-Paellmann alleges that she is the "great-great-granddaughter of Clara and Abel Hinds, Africans who were enslaved on a South Carolina sea island rice plantation." *See* FACC P63.

[5] Madison alleges that her "ancestors were slaves in the agricultural industry in Virginia and North Carolina." *See* FACC P64.

[6] Carrington alleges that his maternal and paternal ancestors "were slaves in North Carolina . . . . were involved in the cotton and tobacco industries." *See* FACC P66.

[7] Barber alleges that his ancestors were enslaved in the agricultural industry and other industries. *See* FACC P67.

[8] Hurdle-Toomey alleges that her father, Andrew Jackson Hurdle, was a slave who was sold to a Texas family when he was ten years old. *See* FACC P69. The Texas family is not an identified defendant.

[9] Porter alleges that her ancestors were slaves. *See* FACC P73.

[10] Wyatt-Kervin alleges that she is the daughter of former slaves, Jake and Louise Wyatt. *See* FACC P74. Bill Gene McGee alleges that he is the guardian ad litem of Wyatt-Kervin, and brings this case as her representative. *See id.* P76.

[11] Clark alleges that "she was enslaved in the agricultural industry in Louisiana from about 1927 through 1934," and further alleges that "a couple that operated a dairy farm . . . told her that they bought her and she was their slave." *See* FACC P75. The couple

McGee,[12] C. Doe, [13] Antoinette Harrell Miller,[14] as well as a group of seven anonymous plaintiffs.[15] The named plaintiffs (hereinafter collectively referred to as "Plaintiffs"), on behalf of themselves and the classes they seek to represent,[16] seek reparations on behalf of all "descendants of formerly enslaved Africans" and all living "formerly enslaved African-Americans." *See* FACC P60. Specifically, Plaintiffs seek an accounting, constructive trust, restitution, disgorgement,

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is not an identified defendant.

[12] McGee alleges that she is the "great grand-daughter of Andrew Jackson Hurdle, an enslaved African." *See* FACC P77.

[13] C. Doe alleges that he was a slave through the 1960s, and "he and his family were forced to live on the slave quarters of a plantation that grew numerous agricultural crops such as cotton and rice." *See* FACC P89. C. Doe further alleges that "upon information and belief, . . . some or all of Defendants corporate entities doing business in Mississippi or Louisiana had reason to know of the construction of forms of slavery yet failed to take steps to eliminate same, while they continue to inure benefits form [sic.] the illegal, but sanctioned system of servitude Post-Emancipation." See *id.* P90.

[14] Miller alleges that she is a descendant of a former slave, Carrie Richardson. *See* FACC P92.

[15] The group of seven unnamed plaintiffs include: C. Doe, Jr., M.L. Doe, E.H. Doe, A.L. Doe, A. Doe I. Doe and C. W. Doe, who are all alleged to have been enslaved "for the benefit of the cotton industry, sugar industry and rice industry to name of [sic.] few." *See* FACC P91.

[16] Plaintiffs refer to numerous classes of plaintiffs, but have not filed any motion for class certification pursuant to the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 23.

compensatory and punitive damages arising out of the named defendants' alleged past and continued wrongful conduct relating to the institution of slavery. *See id.* P55.

2. *Defendants*

The named defendants (hereinafter collectively referred to as "Defendants") are eighteen present-day companies whose predecessors are alleged to have been unjustly enriched through profits earned either directly or indirectly from the Trans-Atlantic Slave Trade and slavery between 1619 and 1865, as well as post-Emancipation slavery through the 1960s.

Defendants include the following companies: FleetBoston Financial Corporation, CSX Corporation, Aetna Inc., Brown Brothers Harriman, New York Life Insurance Company, Norfolk Southern Corporation, Lehman Brothers, Lloyd's of London, Union Pacific Railroad, JP Morgan Chase Manhattan Bank, Westpoint Stevens Inc., RJ Reynolds Tobacco Company, Brown and Williamson, Liggett Group Inc., Loews Corporation, Canadian National Railway, Southern Mutual Insurance Company, and American International Group ("AIG").[17]

Plaintiffs allege that FleetBoston, through its predecessor bank, made loans to slave traders and also collected custom duties and fees on ships engaged in the slave trade. *See id.* PP125-27. Plaintiffs further allege that "FleetBoston engaged in a self-concealed business enterprise so that the plaintiff

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[17] In addition to joining in the present motion to dismiss, both Defendants Loews Corporation and Canadian National Railway have filed separate motions to dismiss, based on grounds unique to them, pending with the court.

class and/or plaintiffs' ancestors would not be aware of the existence of this enterprise," and, in more recent times, "made various misleading statements to the Press from March 2000 to February 2002, attempting to disassociate its predecessor company from its current company." *Id.* PP129-30.

Plaintiffs allege that CSX "is a successor-in-interest to numerous predecessor railroad lines that were constructed or run, at least in part, by slave labor." *Id.* P131. Plaintiffs further allege that "CSX engaged in a self-concealed business enterprise as the plaintiff class and/or plaintiff ancestors would not be aware of the existence of this enterprise," and, in more recent times, "withheld information or made a misleading statement to the Press regarding their participation in and profiting from slavery." *Id.* PP132-33.

Plaintiffs allege that "Aetna's predecessors in interest, actually insured slave owners against the loss of their human chattel . . . [and] therefore unjustly profited from the institution of slavery." *Id.* P134. Plaintiffs further allege that "Aetna engaged in a self-concealed business enterprise as the plaintiff class and/or plaintiff ancestors would not be aware of the existence of this enterprise," and, in more recent times, "withheld information or made a misleading statement regarding their participation in and profiting from slavery." *Id.* PP135-36.

Plaintiffs allege that Brown Brothers Harriman is the successor corporation to Brown Brothers & Co., which "loaned millions directly to planters, merchants and cotton brokers throughout the South, . . . [and] records also reveal that Brown Brothers loaned to plantation owners who told the firm that they needed the cash to buy slaves." *Id.* P137. Plaintiffs also allege that "Louisiana court records dating back

to the 1840's . . . reveal the firm's ownership of at least two cotton plantations totaling 4,614 acres and the plantations' 346 slaves." *Id.* P138. Plaintiffs further allege that "Brown Brothers Harriman engaged in a self-concealed business enterprise as the plaintiff class and/or plaintiff ancestors would not be aware of the existence of this enterprise," and, in more recent times, "withheld information or made a misleading statement based on press reports after the filing, trying to disassociate . . . from its predecessor's business." *Id.* PP140-41.

Plaintiffs allege that "New York Life's predecessor-in-interest, Nautilus Insurance, earned premiums from its sale of life insurance to slave owners." *Id.* P142. Plaintiffs further allege that "New York Life engaged in a self-concealed business enterprise as the plaintiff class and/or plaintiff ancestors would not be aware of the existence of this enterprise," and, in more recent times, "withheld information or made misleading statements regarding their participation in and profiting from slavery." *Id.* PP143, 145.

Plaintiffs allege that Norfolk Southern "is a successor-in-interest to numerous railroad lines that were constructed or run, in part, by slave labor." *Id.* P147.

Plaintiffs allege that the founder of Lehman Brothers, Henry Lehman, and his brothers "grew rich as middlemen in the slave-grown cotton trade." *Id.* P148.

Plaintiffs allege that Lloyd's of London "was involved in the insuring of ships utilized for the Trans-Atlantic slave trade." *Id.* P149. Plaintiffs further allege that "Lloyd's engaged in a self-concealed business enterprise as the plaintiff class and/or plaintiff ancestors would not be aware of the existence of this enterprise." *Id.* P150.

Plaintiffs allege that Union Pacific "is a successor-in-interest to numerous predecessor railroad lines that were constructed or run in part by slave labor." *Id.* P152. Plaintiffs further allege that "Union Pacific engaged in a self-concealed business enterprise as the plaintiff class and/or plaintiff ancestors would not be aware of the existence of this enterprise," and, in more recent times, "withheld information or made a misleading statement regarding their participation in profiting from slavery." *Id.* PP153-54.

Plaintiffs allege that two of the predecessor banks that merged to create J.P. Morgan Chase "were behind a consortium to raise money to insure slavery." *Id.* P155. Plaintiffs further allege that "J.P. Morgan Chase engaged in a self-concealed business enterprise as the plaintiff class and/or plaintiff ancestors would not be aware of the existence of this enterprise," and, in more recent times, "withheld information or made a misleading statement regarding their participation in and profiting from slavery." *Id.* PP156-57.

Plaintiffs allege that Westpoint Stevens "is a successor-in-interest to Pepperell Manufacturing which utilized cotton from Southern planters farmed by enslaved Africans." *Id.* P160.

Plaintiffs allege that R.J. Reynolds Tobacco Company, Brown & Williamson, Liggett Group and Lowes Corporation (parent company of Lorillard Tobacco Company), which were all once part of the American Tobacco Company, are the "beneficiar[ies] of assets acquired through the forced uncompensated labors of enslaved African-Americans." *Id.* PP161, 165, 166, and 168.

Plaintiffs allege that Canadian National Railway "is the successor-in-interest to seven predecessor railroad lines that were constructed or run in part by slave labor." *Id.* P169.

Plaintiffs further allege that "Canadian National engaged in a self-concealed business enterprise as the plaintiff class and/or plaintiff ancestors would not be aware of the existence of this enterprise." *Id.* P171.

Plaintiffs allege that Southern Mutual Insurance "issued policies on the lives of slaves in Louisiana." *Id.* P172.

Plaintiffs allege that "AIG is successor-in-interest to the United States Life Insurance Company . . ., which earned premiums from its sale of life insurance on the lives of enslaved Africans with slave owners as the beneficiaries." *Id.* P173.

As evidenced by Plaintiffs' allegations, and as the court shall further discuss, their Complaint is devoid of any allegations that connect the specifically named Defendants or their predecessors and any of the Plaintiffs or their ancestors.

B. Pleadings

1. Factual Allegations of Plaintiffs' First Amended and Consolidated Complaint

Plaintiffs' Complaint begins with a narration of the historical background of the Transatlantic Slave Trade in America. The Complaint proceeds to describe the Slave Codes, which various States enacted in order to perpetuate the institution of slavery. The Complaint also chronicles how the forced labor of enslaved Africans helped to build our Nation and enrich early American industry, while simultaneously dismantling a culture and impoverishing a race of fellow men and women.

The Complaint then outlines the beginnings of laws that outlawed the trafficking and trade of slaves, which progressed into a body of law that found the institution of slavery to be contrary to the Natural Law of Man. The Complaint proceeds to show that despite this body of law that found the institution of slavery to be contrary to the Natural Law of Man, the vestiges of slavery, in the form of racism, have resulted in modern-day disparities between descendants of slaves and the remainder of our society.

Ultimately, the Complaint alleges that "Defendants, through their predecessors in interest, conspired and/or aided and abetted with slave traders, with each other and other entities and institutions . . . and other unnamed entities and/or financial institutions to commit and/or knowingly facilitate crimes against humanity, and to further illicitly profit from slave labor." *See id.* P53.

2. Counts of Plaintiffs' First Amended and Consolidated Complaint

Count I of Plaintiffs' First Amended and Consolidated Complaint is styled: "Conspiracy." Plaintiffs allege that "each of the defendants acted individually and in concert with their industry group and with each other, either expressly or tacitly, to participate in a plan that was designed in part to commit the tortious acts referred to herein." *Id.* P216.

Count II is styled: "Demand for an Accounting." Plaintiffs allege that "Defendants knew or should have known of the existence of corporate records that indicate their profiting from slave labor[, and] Plaintiffs and the public have demanded that the defendants reveal their complete corporate records regarding same and that a just and fair accounting be made for profits derived from the slave trade." *Id.* P219.

Plaintiffs further allege that "there is a fiduciary relationship that arose between the litigant classes and defendants by virtue of defendants' superior position, maintenance of those positions and, their holding in constructive trust, the proceeds of the unpaid labor of the plaintiffs and / or their ancestors." *Id.* P222. Plaintiffs argue that the production of such corporate records is essential in order to help Plaintiffs to: "heal the continuing psychic harm associated with slavery, trace ancestral records, provide a public and historical record of the violent force necessary to maintain a hierarchy to support slavery, provide evidence of past and subsequently established discrimination, provide a historical record of the economic benefits that accrued to the defendant private institutions as a result of slavery to more fully describe and document the connection between the institution of slavery and racist/discriminatory policies that still exist today, and assist in stemming racial discrimination through the knowledge of the role slavery played in its root causes." *Id.* P221(a-f). Plaintiffs' prayer for relief under Count II seeks, among other things, "the appointment of an independent historic commission to serve as a depository for corporate records related to slavery." *Id.* P223.

Count III is styled: "Crime Against Humanity." Plaintiffs allege that "slavery is and has always been a crime against humanity." *Id.* P224.

Count IV is styled: "Piracy." Plaintiffs allege that "Defendants, upon information and belief[,] committed the crime against humanity by their actions either directly or indirectly in support for the continuation of the smuggling of Africans." *Id.* P230. Plaintiffs' prayer for relief under Count IV seeks an accounting of profits earned from slave labor, a constructive trust imposed on such profits, restitution, equitable disgorgement, and punitive damages. *See id.* P231.

Count V is styled: "Intentional Infliction of Emotional Distress: Rape, Breeding, Torture, Abuse and the Spread of Racist Beliefs." Plaintiffs allege that "Defendants' predecessor companies aided or abetted, or under other theories of third party liability . . ., participated in, allowed, or implicitly or recklessly, sanctioned, and/or benefitted from an institution that relied in [sic.] the sexual exploitation, violent abuse and rape to achieve its goals of a malleable and unpaid work force." *Id.* P233. Plaintiffs further allege that "Defendants' predecessor companies aided or abetted, or under other theories of third party liability . . ., participated in, allowed implicitly or recklessly and / or unjustly benefitted from" the spread of racist ideology concerning the inferiority of the African race. *Id.* P236. Plaintiffs' prayer for relief under Count V seeks an accounting of profits earned from slave labor, a constructive trust imposed on such profits, restitution, equitable disgorgement, and punitive damages. *Id.* P238.

Count VI is styled: "Conversion." Plaintiffs allege that "as a result of defendants' failure and refusal to account for, acknowledge and return to plaintiffs and the plaintiff class, the value of their ancestors' slave labor, defendants have wilfully and wrongfully misappropriated and converted the value of that labor and its derivative profits into defendant's own property." *Id.* P240. Plaintiffs' prayer for relief under Count VI seeks an accounting of profits earned from slave labor, a constructive trust imposed on such profits, restitution, equitable disgorgement, and punitive damages. *See id.* P242.

Count VII is styled: "Unjust Enrichment." Plaintiffs allege that "Defendants' failure to pay for the labor provided by the slaves without receiving any compensation, has allowed defendants to retain a benefit at the expense of the plaintiffs' and their ancestors." *Id.* P247. Plaintiffs' prayer for relief under Count VII seeks an accounting of profits earned from

slave labor, a constructive trust imposed on such profits, restitution, equitable disgorgement, and punitive damages. *See id.* P253.

Count VIII is styled: "42 U.S.C. § 1982." Plaintiffs allege that as a result of the Defendants' conduct that denied slaves of the value of their labor, and the Defendants' conduct in restricting access to corporate records regarding participation in slavery, the Plaintiffs' ancestors', and their descendants', rights to inherit and convey property have been violated in contravention of 42 U.S.C. § 1982. *See id.* PP255-56.

Count IX, which is pled in the alternative, is styled: "Alien Torts Claims Act." Plaintiffs posit that, as "many of the torts set out in the instant complaint occurred prior to the formal end of chattel slavery in the United States of America," *id.* P237, Plaintiffs' ancestors were not citizens of the United States at such a time. *See id.* P238.[18] Plaintiffs further allege that slavery and international slave trafficking violated international law, and that since their ancestors were non-citizens, the Alien Torts Claims Act provides a source to relief for those violations of international law. *See id.* PP237-43.

Lastly, Counts X through XIV of the Plaintiffs' Complaint allege that the factual allegations constitute violations of various state consumer protection laws. Specifically, Count X alleges a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 et seq. (2003); Count XI alleges a violation of the Louisiana

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[18] *See supra* footnote 3 (indicating that citations in this opinion are to the paragraphs as styled in Plaintiffs' Complaint, and in certain instances, do not proceed chronologically).

Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. Ann. § 51:1401 et seq. (2003); Count XII alleges a violation of the New Jersey Unfair Trade Practice Law, N.J. Stat. Ann. § 56:8-1 (2003); Count XIII alleges a violation of the New York Consumer Protection From Deceptive Acts and Practices Law, NY Gen. Bus. Law §§ 349-350 (2003); and Count XIV alleges a violation of the Texas Deceptive Trade Practices and Consumer Protection Act, Tex. Bus. and Com. Code Ann. § 17.41 (2002). *See* FACC PP244-253.

In essence, the Plaintiffs seek reparations from Defendants for their alleged roles in the institution of human chattel slavery as it existed in the United States from 1619 through 1865, to date.

3. Defendants' Joint Motion to Dismiss

Defendants have responded to Plaintiffs' Complaint with the present Motion to Dismiss, brought pursuant to Federal Rules of Civil Procedure 12(b)(1)and (6).[19] *See* Defs.' Joint Mot. to Dismiss, at 1. Defendants allege four separate grounds which warrant dismissal: (1) Plaintiffs' claims fall short of both constitutional and prudential standing requirements; (2) Plaintiffs' claims present a non-justiciable political question; (3) Plaintiffs' claims fail to state any cognizable claim; and (4) all of Plaintiffs' claims are time-barred. *See id.*, at 4-5. Defendants' motion is fully briefed and now before the court.

IV. DISCUSSION

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[19] All named Defendants have joined in the present motion to dismiss. Certain individual defendants have filed separate motions to dismiss on grounds unique to them.

A. Justiciability Doctrines

Article III, § 2 of the United States Constitution provides that federal courts have jurisdiction only if presented with a "Case" or "Controversy." The requirement of a case or controversy imposes a "dual limitation" upon the federal courts. *See Flast v. Cohen,* 392 U.S. 83, 94, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968). First, the requirement of a case or controversy serves to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Id.* Second, the requirement of a case or controversy serves to "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Id.* This "dual limitation" found in the requirement of a case or controversy is enforced by what have been termed the justiciability doctrines of Article III, which state the fundamental limits on federal judicial power in our system of government. *See Allen v. Wright,* 468 U.S. 737, 750, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984). "Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so." *Renne v. Geary,* 501 U.S. 312, 316, 115 L. Ed. 2d 288, 111 S. Ct. 2331 (1991). The justiciability doctrines include principles such as the prohibition against advisory opinions, standing, ripeness, mootness, and the political question doctrine. *See generally* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 46 (Aspen Law & Business 1997). "The Article III doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important of these doctrines." *Allen,* 468 U.S. at 750.

1. Standing

The doctrine of standing ensures that a litigant is the proper party to bring a matter before a federal court for adjudication, by asking if that specific litigant has a sufficient stake in the matter to invoke the federal judicial process. As the United States Supreme Court recently reiterated: "We have consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Raines v. Byrd,* 521 U.S. 811, 819, 138 L. Ed. 2d 849, 117 S. Ct. 2312 (1997).

a. Historical Overview of the Doctrine of Standing

The requirement that a litigant demonstrate standing – a personal stake in an alleged dispute – to bring a matter before a court for adjudication has been a bedrock principle in our system of law, as well as the common law system from which our system of law developed. The standing doctrine comes from the well-known common law doctrine of *locus standi,* which translated from Latin means "place of standing." In essence, the doctrine of *locus standi* concerns whether an individual has the legal capacity to institute proceedings. *See, e.g.,* S. M. Thio, *Locus Standi and Judicial Review* 13-14, 235-36 (1971) (analyzing the doctrines of standing in the United States and in other common law countries). The concept of standing, or *locus standi,* was well known to the early federal courts. *See, e.g., Southern Exp. Co. v. Western N.C.R. Co.,* 99 U.S. 191, 201, 25 L. Ed. 319 (1878) (holding that since appellant had no legally cognizable interest in the suit, appellant "can, therefore, have no *locus standi* in a court of equity").

The standing doctrine serves to reinforce that "the province of the court is, solely, to decide on the rights of individuals . . . ." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 170, 2 L. Ed. 60 (1803). As stated in an authoritative nineteenth century treatise: "The general rule is that the action should be brought in the name of the party whose legal right has been affected, against the party who committed or caused the injury, or by or against his personal representative." Joseph Chitty, *A Treatise on Pleading and Parties to Actions* 1 (G. & C. Merriam 1867). In specific reference to tort actions, that treatise provides:

> The action for a tort must in general be brought in the name of the person whose *legal* right has been affected, and who was *legally* interested in the property at the time the injury thereto was committed; for he is impliedly the party injured by the tort, and whoever has sustained the loss is the proper person to call for compensation from the wrongdoer.

Id. at 59 (emphasis in original and footnotes omitted). This treatise was relied upon by the United States Supreme Court in *Tyler v. Judges of Court of Registration,* 179 U.S. 405, 407, 45 L. Ed. 252, 21 S. Ct. 206 (1900), in which the Supreme Court discussed the proper parties to litigation. In elucidating the standing doctrine's focus on the rights of individuals, the *Tyler* Court stated:

> The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defense set up by the party pursued. Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to

> himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens.

Id. at 406. In *Tyler*, the Court reiterated that the doctrine of standing "has been announced in so many cases in this court that it may not be considered an open question." *Id.*

This core aspect of the doctrine of standing – that a litigant demonstrate a personal stake in an alleged dispute – has remained unchanged as the Supreme Court has elucidated the modern formulation and rationale for the doctrine.

b. Modern Formulation of the Doctrine of Standing

The standing doctrine involves both constitutional limitations on federal courts, based on Article III, and prudential limitations on the exercise of federal court jurisdiction. *See, e.g., Warth v. Seldin,* 422 U.S. 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). The modern formulation of the constitutional limitations of the standing doctrine was elucidated in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992), where the Supreme Court stated:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct

> complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560 - 61 (citations and internal quotations omitted). "This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement." *Steel Co. v. Citizens For a Better Environment,* 523 U.S. 83, 103-04, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998). These constitutional limitations on standing "are not confined to the facts of any particular case, but are broadly relevant to standing in any Article III controversy." *Plotkin v. Ryan,* 239 F.3d 882, 884 (7th Cir. 2001).

The party seeking to invoke federal court jurisdiction has the burden of establishing the elements of standing. *See Lujan,* 504 U.S. at 561. "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* The present motion is a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b), and in this posture "we must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations." *Citizens For a Better Environment,* 523 U.S. at 104. "However, where standing is challenged as a factual matter, the plaintiff bears the burden of supporting the allegations necessary for standing with competent proof." *Perry v. Village of Arlington Heights,* 186 F.3d 826, 829 (7th Cir. 1999) (quoting *Retired Chicago*

Police Ass'n. v. City of Chicago, 76 F.3d 856, 862 (7th Cir. 1996)) (internal quotations omitted); *see also McNutt v. General Motors Acceptance Corp. of Indiana,* 298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1936) (indicating that the party invoking federal court jurisdiction must "allege in his pleading the facts essential to show jurisdiction [and] if he fails to make the necessary allegations he has no standing"). "'Competent proof' requires a showing by a preponderance of the evidence that standing exists." *Id.* (quoting *NLFC, Inc. v. Devcom Mid-America, Inc.,* 45 F.3d 231, 237 (7th Cir. 1995)); *see also McNutt,* 298 U.S. at 189 (stating that when "allegations of jurisdictional facts are challenged . . . in any appropriate manner, [the party alleging jurisdiction] must support them by competent proof;" and if unchallenged, the federal courts "may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence").

c. Plaintiffs' Allegations in Support of their Standing to Maintain this Suit

In general, Plaintiffs claim that the source of their injury is the institution of slavery. Plaintiffs point to three distinct injuries which they allege are sufficient to confer them standing to maintain this suit. First, "the complaint alleges that enslaved African-Americans suffered concrete injury to their property and tort rights and that their descendants suffer derivative harm today." Pls.' Resp. to Defs.' Mot. to Dismiss, at 3. Specifically, Plaintiffs allege injury through being "denied the economic wealth of their ancestors' labor," which they refer to as a "derivative and inherited property right in their ancestors' lost pay." FACC PP100-01. Second, Plaintiffs allege that they are injured on a continuing basis. Specifically, Plaintiffs allege that "they still endure daily indignities from the legacy of slavery, including, but not limited to, racial profiling, racial slurs, and improper and

hurtful assumptions regarding their overall status." *Id.* P102. Further, Plaintiffs allege that they "are also likely to encounter future harm, as they are more likely to have a shorter life expectancy; more likely [to] go to jail; and are more likely to be murdered, than their white counterparts." *Id.* Third, Plaintiffs' allege that they are "presently consumers of Defendants" and have been injured by certain communications made by the Defendants concerning their respective roles in the institution of slavery. *See id.* P93. Specifically, Plaintiffs allege that "due to unconscionable, fraudulent and deceptive public communications made by defendants, plaintiffs suffered the harm of being misled, confused, and deceived about the roles the defendants played in the enslavement of African peoples." *Id.* Further, Plaintiffs allege injury through the Defendants' refusal to provide documentation that relates to any profits made as a result of the institution of slavery. *See* Pls.' Resp. to Defs.' Mot. to Dismiss, at 12.

(1). Constitutional Limitations on Standing

(a). Derivative Harm

It is well-established that a plaintiff must "'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99, 60 L. Ed. 2d 66, 99 S. Ct. 1601 (1979)). Plaintiffs cannot establish a personal injury by merely identifying tort victims and alleging a genealogical relationship. The illegal conduct at issue here, the institution of slavery, is alleged to have directly affected Plaintiffs' ancestors. Plaintiffs now, more than a century later,

point to that horrific institution as the source of their derivative injury.[20] However, Plaintiffs' own choice of words, *derivative,* should be sufficient to signify the standing problem in this case. *See* FACC PP100-01; *see also* Pls.' Resp. to Defs.' Mot. to Dismiss, at 3. Plaintiffs fail to allege that they have personally suffered a concrete and particularized injury as a result of Defendants' putatively illegal conduct; rather, Plaintiffs' alleged injury is derivative of the injury inflicted upon enslaved African-Americans over a century ago. This is insufficient to establish standing, and contrary to centuries of well-settled legal principles requiring that a litigant demonstrate a personal stake in an alleged dispute. *See, e.g., Tyler,* 179 U.S. at 406-07 (stating that a plaintiff must "aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens"); *Lujan,* 504 U.S. at 560 (stating that a "plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is . . . concrete and particularized"); *Raines,* 521 U.S. at 819 (stating that "a plaintiff's complaint must establish that he had a 'personal stake' in the alleged dispute, and that the alleged injury is particularized as to him"). To recognize Plaintiffs' standing in such a situation "would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Allen,* 468 U.S. at 756 (citing *United States v. SCRAP,* 412 U.S. 669, 687, 37 L. Ed. 2d 254, 93 S. Ct. 2405 (1973)).

In addition, the injury alleged cannot be "conjectural or hypothetical." *Lujan,* 504 U.S. at 560. Plaintiffs allege injury through being "denied the economic wealth of their ancestors'

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[20] Nine of the named Plaintiffs allege to have been slaves during the twentieth century, but also fail to establish standing to sue Defendants for their alleged injuries. See discussion *infra* at 27.

labor," which they refer to as a "derivative and inherited property right in their ancestors' lost pay." FACC PP100-01. However, Plaintiffs' claim to the economic wealth of their ancestors' labor is conjectural. While most would like to assume that they will be the beneficiaries of their ancestors' wealth upon their demise, this is a mere assumption. Plaintiffs can only speculate that their ancestors' estates would have been passed on to them, and cannot say that they would have inherited their ancestors' lost pay. This is insufficient to show a personal injury to Plaintiffs.

Further, the Plaintiffs must allege a "causal connection between the injury and the conduct complained of." *Lujan,* 504 U.S. at 560. "The injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court . . . ." *Id.* The allegations of Plaintiffs' Complaint do not link these Defendants to the alleged harm. Plaintiffs fail to allege any facts in their Complaint that link the specifically named Defendants to the alleged injuries suffered by the Plaintiffs; nor does the Plaintiffs' Complaint allege a connection between any of the named Defendants and any of the Plaintiffs' ancestors. The named Plaintiffs who allege that they are descendants of enslaved African-Americans fail to allege that their ancestors were enslaved by any of the eighteen specifically named Defendants. Likewise, the named Plaintiffs who allege that they were slaves fail to allege that they were enslaved by any of the eighteen specifically named Defendants. Plaintiffs' only response to this fundamental defect is to allege that Defendants were engaged in "co-dependent" industries and therefore vicariously liable for the institution of slavery. However, Plaintiffs fail to allege how these named Defendants were involved in these "co-dependent" industries. Plaintiffs offer no allegations that Defendants had any relationships with specific entities that

enslaved Plaintiffs or their ancestors. More than "unadorned speculation" is required to establish standing. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 43-44, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976).

(b). Continuing Injury

Plaintiffs' allegations that they suffer injury on a continuing basis also fail to establish the requisite standing. Plaintiffs claim a continuing injury through the allegation that "they still endure daily indignities from the legacy of slavery, including, but not limited to, racial profiling, racial slurs, and improper and hurtful assumptions regarding their overall status." FACC P102. Further, Plaintiffs allege that they "are also likely to encounter future harm, as they are more likely to have a shorter life expectancy; more likely [to] go to jail; and are more likely to be murdered, than their white counterparts." *Id.*

Plaintiffs' allegations of continuing harm are no different than the allegations of continuing harm made by the plaintiffs in *Cato v. United States,* 70 F.3d 1103 (9th Cir. 1995), and other similar cases. In Cato, descendants of enslaved African-Americans filed a complaint against the United States government seeking damages due to the enslavement of, and subsequent discrimination against, African-Americans. *Cato,* 70 F.3d at 1105. The plaintiffs in Cato alleged injuries based on "disparities in employment, income, and education" between African-Americans and other racial groups. *Id.* at 1109. The Cato court found that such allegations were insufficient to establish an injury personal to the plaintiffs so as to establish the plaintiffs' standing; rather, such injuries were "a generalized, class-based grievance . . . ." *Id.* Other courts faced with similar complaints have also found that those plaintiffs had failed to establish their standing to litigate

claims based on continuing injuries alleged to be the result of slavery. *See, e.g., Bell v. United States,* 2001 U.S. Dist. LEXIS 13591, No. Civ. A. 301CV0338D, 2001 WL 1041792, at *2 (N.D. Tex. Aug. 31, 2001) (plaintiff lacked standing to file suit against United States government seeking damages for the enslavement of African-Americans); *Bey v. United States Department of Justice,* 1996 U.S. Dist. LEXIS 22777, No. 95 CIV 10401, 1996 WL 413684, at *1 (S.D.N.Y. July 24, 1996) (same); *Langley v. United States,* 1995 U.S. Dist. LEXIS 22399, No. C 95-4227, 1995 WL 714378, at *2 (N.D. Cal. Nov. 30, 1995) (same); *Himiya v. United States,* 1994 U.S. Dist. LEXIS 9748, No. 94 C 4065, 1994 WL 376850, *2 (N.D. Ill. July 15, 1994) ("Although it is extremely regrettable that this country's history, as well as the history of many other countries, includes a significant history of slavery, the plaintiff does not have proper standing under the law to recover damages for this reprehensible time period."). Like the plaintiffs' allegations in *Cato* and the other slavery reparations cases decided after *Cato,* Plaintiffs' allegations of continuing harm in this case do not establish a concrete and particularized injury-in-fact, as these allegations are too speculative and generalized. *See Lujan* 504 U.S. at 560-61.

Plaintiffs argue that the other lawsuits seeking reparations for acts related to the institution of slavery are distinguishable on the grounds that those cases were brought by *pro se* plaintiffs, acting without the guidance of counsel, and against the United States Government, protected from suit by the doctrine of sovereign immunity. These are distinctions without a difference. Those *pro se* plaintiffs could have been represented by attorneys and the result would not have

changed.[21] Furthermore, the doctrine of sovereign immunity was only one of many jurisdictional bars to suit in those cases, including standing. The constitutional limitations on standing, including an injury-in-fact, "are not confined to the facts of any particular case, but are broadly relevant to standing in any Article III controversy." *Plotkin,* 239 F.3d at 884. Like the plaintiffs in those cases, Plaintiffs fail to allege any concrete and particular injury-in-fact that they have suffered apart from their race generally.

Further, Plaintiffs complaint is devoid of any allegations that any specific conduct of the Defendants was a cause of the continuing injuries of which Plaintiffs complain. Such wideranging social ills are not even alleged "to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan,* 504 U.S. at 560. Plaintiffs' allegations of abstract stigmatic injury are not cognizable absent specific allegations of conduct on behalf of the Defendants that has been directed at Plaintiffs or their ancestors. *Cf. Allen,* 468 U.S. at 755-56.

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[21] In fact, courts give special treatment to *pro se* litigation. *See, e.g., Haines v. Kerner,* 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972) (holding that allegations of *pro se* complaints are held to "less stringent standards than formal pleadings drafted by lawyers"); *see also Castro v. United States,* 540 U.S. 375, 157 L. Ed. 2d 778, 124 S. Ct. 786, 791-92 (Dec. 15, 2003) (indicating that while holding *pro se* complaints to less stringent standards, courts may recharacterize such motions in order to avoid unnecessary dismissal or inappropriately stringent application of formal labeling requirements).

(c). Miscellaneous Injury

Lastly, Plaintiffs allege injury, in their status as consumers of the Defendants, through being misled, confused and deceived about the roles the Defendants played in the enslavement of African peoples, as a result of Defendants' public communications. *See* FACC P93. Plaintiffs also allege a separate harm through the Defendants not turning over documents that relate to their involvement in securing profits from slavery. *See id.* PP218-23. These alleged injuries relate to causes of action plead in Plaintiffs' Complaint as violations of various state consumer protection laws. *See id.*, Counts X-XIV. Plaintiffs argue that their allegations that Defendants have violated these State consumer protection laws are sufficient to confer them standing to pursue these, and all other, claims. *See* Pls.' Resp. to Defs.' Mot. to Dismiss, at 11. Further, Plaintiffs argue that some of these statutes do not even require that an injury be alleged, and therefore their standing to pursue all claims is a given. *See id.*

This argument misses the mark. The fact that a state statute dispenses with the requirement that an injury be alleged does not, and cannot, abrogate constitutional limitations imposed by Article III that a personal injury-in-fact is a prerequisite for standing to sue in a federal court. *See, e.g., Burford v. Sun Oil Co.*, 319 U.S. 315, 317, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943) (holding that state legislatures may not expand the jurisdiction of the federal district courts); *see also Rifkin v. Bear Stearns & Co., Inc.*, 248 F.3d 628, 631 (7th Cir. 2001) (same). These constitutional limitations on standing cannot be altered by either state or federal law. See *Gladstone, Realtors,* 441 U.S. at 100 (holding that Congress may not abrogate the constitutional limitations on standing); *Watson v. Tarpley,* 59 U.S. 517, 520, 15 L. Ed. 509 (1855) (holding that "[state] laws cannot affect, either by enlargement

or diminution, the jurisdiction of the courts of the United States as vested and prescribed by the constitution and laws of the United States"); *see also* U.S. Const. art. VI, cl. 2 (Supremacy Clause). Further, Plaintiffs cannot use their standing to pursue one type of claim in a State court in order to establish their standing to pursue all of the claims asserted in the present case in a federal court. "The plaintiffs must establish the district court's jurisdiction over each of their claims independently; they are not permitted to use one count of their complaint to establish federal subject matter jurisdiction and a separate count to establish standing." *Rifkin,* 248 F.3d at 634.

Moreover, these injuries alleged in Plaintiffs' status as consumers of Defendants do not establish a legally cognizable injury. Aside from alleging a general state of confusion, the Plaintiffs fail to allege any injury-in-fact that has come about as a result of that confusion. "The injury alleged must be . . . distinct and palpable, and not abstract or conjectural or hypothetical." *See Allen,* 468 U.S. at 751 (citations omitted). Additionally, "in ruling on standing, it is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast,* 392 U.S. at 102. "Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power." *Id.* Plaintiffs fail to allege that Defendants have any duty to turn over any such documentation. Plaintiffs allege that "there is a fiduciary relationship that arose between the litigant classes and defendants by virtue of defendants' superior position, maintenance of those positions and, their holding in constructive trust, the proceeds of the unpaid labor of the plaintiffs and/or their ancestors." FACC P222. However,

Plaintiffs make this conclusory statement without any specific factual allegations in support of it. Plaintiffs offer unsupported conclusions wrapped in legally significant terms, such as fiduciary duty and constructive trust, which are insufficient to establish standing. "The requirements of Article III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process." *Valley Forge,* 454 U.S. at 471. Again, more than "unadorned speculation" and conclusory allegations are required to establish standing. *See Simon,* 426 U.S. at 43-44.

(d). Conclusion

In response to all these deficiencies, Plaintiffs argue that "'standing can be supported by a very slender reed of injury.'" Pls.' Resp. to Defs.' Mot. to Dismiss, at 4 (citing 13 Charles Allen Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531.4 (2d ed. 1984)). Plaintiffs are correct that standing can be supported by a very slender reed of injury, as the cases which they cite provide. Yet, this "slender reed" must still have its roots in the soil of an injury personal to the Plaintiffs, not a "derivative harm" uprooted from the soil of another's injury. Plaintiffs wish to litigate the issue of slavery without establishing that they have suffered some concrete and particularized injury as a result of the putatively illegal conduct of the Defendants. *See Valley Forge,* 454 U.S. at 472; *Lujan* 504 U.S. at 560. However, "the fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast,* 392 U.S. at 99. "In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper

party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Id.* at 99-100. Plaintiffs cannot satisfy the first and most basic requirement of constitutional standing - a concrete and particularized personal injury. See *Lujan,* 504 U.S. at 560. Plaintiffs cannot establish a personal injury sufficient to confer standing by merely alleging some genealogical relationship to African-Americans held in slavery over one-hundred, two-hundred, or three-hundred years ago. In attempting to litigate the unopposed issue of slavery rather than their personal injuries, Plaintiffs also cannot satisfy the second requirement of constitutional standing -- injury that is fairly traceable to the conduct of the defendants. *See id.* Plaintiffs do not allege that they had any present property interest that was injured as a result of the Defendants' actions, nor that any action of the Defendants wronged them in any way that would be cognizable under tort theory. Plaintiffs fail to allege any conduct by the eighteen specifically named Defendants that individually affected any of the Plaintiffs.

In sum, the allegations of Plaintiffs' Complaint fail to support their standing to maintain this suit, as required by Article III of the United States Constitution.

(2). Prudential Limitations on the Standing Doctrine

Beyond the constitutional limitations on the standing doctrine, there are prudential limitations on the exercise of federal court jurisdiction. *See, e.g., Warth,* 422 U.S. at 498. These additional prudential limitations on standing may exist even though the Article III requirements are met because "the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone, Realtors,* 441 U.S.

at 99-100. Like the constitutional limitations on the standing doctrine, these prudential limitations ensure that federal courts adhere to the separation of powers concept and are "founded in concern about the proper, and properly limited, role of the courts in a democratic society." *Warth,* 422 U.S. at 498. However, "unlike their constitutional counterparts, they can be modified or abrogated by Congress." *Bennett v. Spear,* 520 U.S. 154, 162, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997).

One of these prudential limits on standing is that a litigant must normally assert his own legal interests rather than those of third parties. *See Singleton v. Wulff,* 428 U.S. 106, 113-14, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976); *Warth,* 422 U.S. at 499. Another is that the federal courts should "refrain[] from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge,* 454 U.S. at 475 (citing *Warth,* 422 U.S. at 499-500).

(a). Plaintiffs Impermissibly Attempt to Assert the Legal Rights of Absent Third Parties

As a general rule, a litigant must assert his own legal rights and cannot assert the legal rights of a third-party. *See, e.g., Powers v. Ohio,* 499 U.S. 400, 410, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991); *Singleton,* 428 U.S. at 113-14. However, a litigant may assert the rights of absent third-parties in certain limited situations. In determining whether a litigant who seeks standing to assert the legal rights of a third-party may do so, a two-part inquiry is involved. *See Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 623 n.3, 105 L. Ed. 2d 528, 109 S. Ct. 2646, 109 S. Ct. 2667 (1989). First, the litigant must have personally suffered some injury-in-fact adequate to satisfy Article III's case or controversy

requirement. *See id.; see also Singleton,* 428 U.S. at 112. Second, certain prudential considerations must point in favor of permitting the litigant to assert the third-party's legal rights. *See id.* Among the prudential considerations to consider are the requirements that the litigant must have a legally sufficient relation to the third-party, see *Powers,* 499 U.S. at 411; *see also Craig v. Boren,* 429 U.S. 190, 196, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976), and there must exist some hindrance to the third-party's ability to protect his or her own rights, *see Powers,* 499 U.S. at 411; *see also Singleton,* 428 U.S. at 115-116.

To the extent that Plaintiffs are attempting to assert the legal rights of their ancestors, Plaintiffs cannot do so because they themselves have failed to establish that they have personally suffered some injury-in-fact adequate to satisfy Article III's case-or-controversy requirement. *See Singleton,* 428 U.S. at 112. In addition, prudential considerations militate against allowing such claims. First, Plaintiffs have not alleged a legally sufficient relation to their ancestors. All that Plaintiffs allege is a genealogical relationship, and more is required under the law in order to confer third-party standing. *Cf. Gilmore v. Utah,* 429 U.S. 1012, 1016-17, 50 L. Ed. 2d 632, 97 S. Ct. 436 (1976) (indicating that a mother had no standing to contest her son's execution). Plaintiffs make no allegations of any relationship sufficient, whether by common law or statute, to confer them standing to pursue the claims of their deceased ancestors. *Cf. Whitmore v. Arkansas,* 495 U.S. 149, 163, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990) (recognizing a next-friend's standing to sue in certain situations); *United Food & Comm. Workers Union Local 751 v. Brown Group,* 517 U.S. 544, 558, 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996) (recognizing that the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq., grants unions standing to sue on behalf of its members).

Furthermore, Plaintiffs do not allege that they are assignees of a legally cognizable claim against the named Defendants. Second, Plaintiffs have not alleged that any hindrance existed to their ancestors' ability to have protected their own rights over the last century. *Cf. Johnson v. McAdoo,* 45 App. D.C. 440, 441 (D.C. 1916), *aff'd,* 244 U.S. 643, 61 L. Ed. 1367, 37 S. Ct. 649 (1917) (evidencing a claim for slavery-based reparations nearly a century ago).

In sum, Plaintiffs have not established third-party standing to assert the legal rights of their ancestors.

(b). Plaintiffs Impermissibly Attempt to Litigate a Generalized Grievance Which is Best Addressed in the Representative Branches

As currently framed, Plaintiffs' Complaint seeks to litigate a generalized grievance over one of the most horrific chapters of our Nation's history rather than a personal dispute, which the federal courts are able to adjudicate. For the reasons stated in the following section, such an "abstract question[] of wide public significance" should be left to the representative branches of our system of government. See *Valley Forge,* 454 U.S. at 475.

2. The Political Question Doctrine

Defendants also argue that the court should dismiss Plaintiffs' Complaint because the issue of reparations to former slaves presents a non-justiciable political question. *See* Defs.' Joint Mot. to Dismiss, at 26-38. Although the court has dispositively determined that Plaintiffs lack standing to bring the claims raised in their Complaint, with an abundance of caution, the court will next determine whether the political question doctrine provides an independent basis for dismissal.

a. Overview of the Political Question Doctrine

It is well-established that the federal courts will not adjudicate questions that fall within the purview of the political question doctrine. *See Baker v. Carr,* 369 U.S. 186, 210, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962). Like standing, mootness and ripeness, the political question doctrine is a justiciability limitation with its prudential roots dating back to the 18th century. *See, e.g., Hayburn's Case,* 2 U.S. (2 Dall.) 409, 410, 1 L. Ed. 436 (1792) (invalidating a statute authorizing the Executive branch to accept or reject federal court determinations of pension eligibility for Revolutionary War veterans); *Marbury,* 5 U.S. (1 Cranch) at 170 ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."). The political question doctrine restricts judicial review that might interfere with other branches of the federal government. *See McIntyre v. Fallahay,* 766 F.2d 1078, 1081 (7th Cir. 1985). Even in cases where the federal court has subject matter jurisdiction, it could choose not to exercise its jurisdiction to avoid interfering with decisions previously made by the Executive or Legislative branches (hereinafter the "Representative Branches"). See *United States v. Munoz-Flores,* 495 U.S. 385, 393-94, 109 L. Ed. 2d 384, 110 S. Ct. 1964 (1990). When the court reaches this conclusion, the question becomes non-justiciable – meaning not appropriate for judicial review. The non-justiciability of a political question is based primarily on the constitutional principle of separation of powers inherent in the text of the Constitution and the policy of judicial self-restraint. *See Baker,* 369 U.S. at 210; *see also Kashani v. Nelson,* 793 F.2d 818, 827 (7th Cir. 1986); *Flynn v. Shultz,* 748 F.2d 1186, 1189 (7th Cir. 1984); *Calvin v. Conlisk,* 520 F.2d 1, 5 (7th Cir. 1975). Although the political question doctrine is just one aspect of a broader justiciability issue, it has been "applied in

cases involving extremely diverse issues." *Flynn,* 748 F.2d at 1189; *see also Baker,* 369 U.S. at 211-18.

However, not all issues having political implications or significant political overtones are non-justiciable under the political question doctrine. *See Japan Whaling Ass'n. v. American Cetacean Soc.*, 478 U.S. 221, 229-30, 92 L. Ed. 2d 166, 106 S. Ct. 2860 (1986); *see also I.N.S. v. Chadha,* 462 U.S. 919, 921, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983). Rather the Supreme Court has said that "'in determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.'" *Baker,* 369 U.S. at 210 (quoting *Coleman v. Miller,* 307 U.S. 433, 454-55, 83 L. Ed. 1385, 59 S. Ct. 972 (1939)). To further frame the issue, the Supreme Court has identified at least six factors ("*Baker* factors") the court should consider to determine whether a matter raises a non-justiciable political question, including:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217; *see also Kashani,* 793 F.2d at 827. When any one of the foregoing *Baker* factors is implicated, the court should refrain from adjudicating the issue to prevent unwarranted interference with decisions properly made by the Representative Branches of the federal government. *See Munoz-Flores,* 495 U.S. at 393-94; *Baker,* 369 U.S. at 217.

b. Application of the Political Question Doctrine

Before determining whether any of the *Baker* factors require dismissal under the political question doctrine, the court must first decide the applicability of the political question doctrine based on the nature of Plaintiffs' claims. Plaintiffs argue that the political question doctrine is inapplicable here because their claims are *private,* not *political. See* Pls.' Resp. to Defs.' Mot. to Dismiss, at 25 (emphasis added). Specifically, Plaintiffs assert that the doctrine does not apply because their "claims are brought by private individuals against private corporations for tort and property harms that were occasioned by defendants' particular acts of years past, as well as their acts of today."[22] *Id.* The

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[22] In support is their position, Plaintiffs rely on *Kadic v. Karadzic,* 70 F.3d 232 (2nd Cir. 1995), a case which is clearly distinguishable from the present case. In *Caddice,* the Second Circuit declined to dismiss the plaintiffs' claims under the Alien Tort Claims Act alleging gross human rights abuses against a Bosnian Serb leader on the basis of the political question doctrine. 70 F.3d at 250. The *Caddice* court cautioned that "judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions . . ." and added that "although these cases present issues that arise in a politically charged context, that does not transform them into cases involving non-justiciable political questions." *Id.* at 249. However, in reaching its decision, the *Caddice* court stated that it did not have to decide the issue of

court rejects Plaintiffs' argument for two reasons. First, there are numerous cases where the federal courts have dismissed claims by private plaintiffs against private defendants on the basis of the political question doctrine. The majority of these cases arise in the context of reparations claims arising out of World War II. *See, e.g., Kelberine v. Societe Internationale,* 124 U.S. App. D.C. 257, 363 F.2d 989, 995 (D.C. Cir. 1966); *In re Nazi Era Cases Against German Defendants Litig.,* 129 F. Supp. 2d 370, 382 (D.N.J. 2001); *Iwanowa v. Ford Motor Co.,* 67 F. Supp. 2d 424, 489 (D.N.J. 1999); *Burger-Fischer v. Degussa AG,* 65 F. Supp. 2d 248, 282-85 (D.N.J. 1999).

Second, although Plaintiffs couch their claims as *tort* or *property* claims for acts committed by *private* corporate defendants, this alone does not preclude the application of the political question doctrine. The Supreme Court has stated that the identity of the litigants is immaterial to the questions raised by the political question doctrine. *See Munoz-Flores,* 495 U.S. at 394. Additionally, when determining whether the political question doctrine applies, the court must look to the nature of the underlying litigation, not the specific claims enumerated in the complaint. *See Renne,* 501 U.S. at 316 (to determine justiciability, the court must examine the "pleadings and record to determine the nature of the dispute and the interests of the parties in having [the issue] resolved"); *see also Baker,* 369 U.S. at 217 (indicating the need for a

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whether judicial involvement would interfere with actions of other branches of the federal government because the court obtained a "'Statement of Interest'" signed by both the Solicitor General and the State Department's Legal Advisor expressly disclaiming any concern that the political question doctrine should be invoked. *Id.* at 250. No such "Statement of Interest" has been or could be sought in the present case.

"discriminating inquiry into the precise facts and posture of the particular case" when distinguishing between "political questions" and "political cases"). Thus, the issue becomes whether Plaintiffs' claims are the type of claims that have been committed to the Representative Branches for resolution. *See In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d at 378.

Plaintiffs' Complaint establishes that the underlying nature of their lawsuit seeks reparations for Defendants' participation in slavery dating back as far as the year 1691. *See* FACC P9. Although Plaintiffs request both equitable and legal relief, the bulk of this relief centers on Plaintiffs' claim for restitution. For example, Plaintiffs seek, among other things, the following remedies: (1) an accounting containing all records Defendants possess related to the slave trade and slavery; (2) equitable disgorgement of all illicit profits Defendants gained from slavery; (3) the appointment of an independent historic commission designed to fully examine Defendants' actions; (4) a constructive trust imposed on all profits Defendants gained from slavery; and (5) restitution in the value of Plaintiffs' ancestors' slave labor and Defendants' corresponding unjust enrichment. *See id.* PP3, 116. These remedies collectively provide the basis for calculating and distributing the amount of restitution sought, that is the amount in which Plaintiffs claim that Defendants wrongfully benefitted from Plaintiffs' ancestors' unpaid slave labor. *See United States v. Shepard,* 269 F.3d 884, 885 (7th Cir. 2001) (defining restitution as usually meaning the return of ill-gotten gains to which the holder is not legally entitled). Courts have consistently held that claims seeking restitution for forced labor are claims for reparations. *See Iwanowa,* 67 F. Supp. 2d at 485 n.84; *see also Burger-Fischer,* 65 F. Supp. 2d at 281-82. Such claims clearly raise a question as to whether the Judicial branch of the federal government is best suited to

resolve the issue. *See Cato,* 70 F.3d at 1110 (holding that plaintiffs' claims for slavery reparations presented a non-justiciable political question); *see also Kelberine,* 363 F.2d at 995 (concluding that plaintiffs' claims for reparations against private corporate defendant for its involvement in a "Nazi Conspiracy" during World War II were barred by political question doctrine).

To further support this conclusion, in a recent action seeking relief from a German company and its American subsidiaries for damages resulting from the plaintiffs' forced labor in Nazi Germany during World War II, the District Court for the District of New Jersey rejected the very same argument that Plaintiffs raise here. *See In re Nazi Era Cases Against German Defendants Litig,* 129 F. Supp. 2d at 375 (rejecting the plaintiffs' argument that the political question doctrine cannot preclude a claim for reparations brought by an individual against a private company when the underlying abuse alleged was "fundamentally interrelated with the Nazi war effort").

As a result, the fact that Plaintiffs refer to their claims as *private* rather than *political* does not, in and of itself, preclude the court from inquiring into the existence of a non-justiciable political question. Further, based on the nature of Plaintiffs' claims, an analysis of the political question doctrine is necessary. Having reached this conclusion, a review of Plaintiffs' Complaint reveals that all of the *Baker* factors are present in the underlying litigation.

(1). A Textually Demonstrable Constitutional Commitment of the Issue to a Coordinate Political Department

The Constitution commits to the Representative Branches of the United States Government the authority to resolve the issue of reparations to former slaves resulting from the Nation's role in the institution of slavery. As stated above, historians have long debated whether the issue of slavery was the actual cause of the Civil War. *See supra,* Part II.E. However, regardless of what actually caused the Civil War, it is clear that the abolition of slavery as an institution was a fundamental concern of the Representative Branches both during and after the war. *See, e.g.,* Donald G. Nieman, *Promises to Keep; African-Americans and the Constitutional Order, 1776 to the Present* 54 (Oxford University Press 1991). Under the Constitution, the war powers are reserved to the Representative Branches of the federal government. *See* U.S. Const. art. I, § 8; U.S. Const. art. II, § 2; *see also Doe v. Bush,* 323 F.3d 133, 137 (1st Cir. 2003). These powers not only include the power to declare and prosecute war, but also extend to the power to ensure a just and lasting peace following the conclusion of a war. *See Ladue & Co. v. Brownell,* 220 F.2d 468, 472 (7th Cir. 1955) (holding that Congress may reserve the power to seize property following a formal declaration of peace). By exclusively entrusting such powers to the Representative Branches, the Constitution restricts judicial review or interference on many war-related decisions made by Congress and the President both during and after a war. *See Harisiades v. Shaughnessy,* 342 U.S. 580, 589-90, 96 L. Ed. 586, 72 S. Ct. 512 (1952).

In this case, there is a strong historical record indicating that the relief sought, reparations to former slaves following the Civil War, was considered and rejected by the Representative Branches in lieu of other forms of relief. This relief came in many forms, including wartime and post-war legislation, civil rights legislation, and constitutional

amendments – all intended to ensure the liberty of the newly freed slaves and benefit them generally.

For example, prior to the end of the Civil War, Congress passed the Federal Confiscation Acts designed to punish those who participated in the rebellion by confiscating their property. *See* An Act to Confiscate Property Used for Insurrectionary Purposes, ch. 60, 12 Stat. 319 (Aug. 6, 1861), as amended by, An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes, ch. 195, 12 Stat. 589 (July 17, 1862). The Confiscation Acts also freed tens of thousands of slaves who had fled to Union forces by the summer of 1862. *See id.* Shortly thereafter, following a series of Union victories, President Lincoln, using his constitutional authority as Commander-in-Chief, issued the Emancipation Proclamation on January 1, 1863. *See* Abraham Lincoln, The Emancipation Proclamation, Exec. Proclamation No. 17 (Jan. 1, 1863), *reprinted in* 12 Stat. 1268 (1863). The Emancipation Proclamation freed all slaves in the states under Confederate control. *Id.*

Other wartime efforts to ensure the well-being of the newly freed slaves included Congress' creation of the Freedman's Bureau in March 1865. *See* An Act to Establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, 13 Stat. 507 (March 3, 1865). Congress created the Freedman's Bureau pursuant to the war powers to provide former slaves food, clothing, supplies, job placement, educational facilities and homestead land. *Id.; see also* Albert P. Blaustein and Robert L. Zangrando, *Civil Rights and the American Negro: A Documentary History* 210 (Washington Square Press, Inc., New York 1968). The Bureau had the authority to rent or sell to freed slaves land abandoned or confiscated in the Confederacy. *Id.* Although Congress initially intended for the

Bureau's authority to expire one-year after the completion of the Civil War, Congress voted to extend the Bureau's powers over President Johnson's veto. *See* An Act to Continue in Force and to Amend An Act to Establish a Bureau for the Relief of Freedmen and Refugees, and for Other Purposes, ch. 200, 14 Stat. 173 (July 16, 1866); An Act to Continue the Bureau for the Relief of Freedmen and Refugees, and for Other Purposes, ch. 135, 15 Stat. 83 (July 6, 1868); *see also* George R. Bentley, *A History of the Freedmen's Bureau 133* (Octagon Books 1970) (1955).

Congress also passed numerous Civil Rights Acts between the period of 1866-1875. Specifically, the Civil Rights Acts of 1866, 1870, 1871 and 1875 were enacted to secure civil rights for the newly freed slaves. Most notably, the Civil Rights Act of 1866 declared "all persons" to be citizens of the United States and guaranteed them legal equality throughout the nation.[23] *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (April 6, 1866). The Act provided that "all persons . . . shall have the same right in every State . . . as is enjoyed by white citizens." *Id.* § 1 (currently codified, as amended, at 42 U.S.C. § 1981 (2003)).

Additionally, Congress ratified three constitutional amendments (hereinafter collectively referred to as the "Civil War Amendments") between the period of 1865 to 1870 to ensure the liberty of the newly freed slaves. The Thirteenth Amendment, ratified on December 6, 1865, provides, in part:

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[23] Because there were questions as to whether the Thirteenth Amendment authorized the Civil Rights Act of 1866, Congress ratified the *Fourteenth Amendment* on July 9, 1868, rendering the issue moot. See U.S. Const. amend XIV.

"Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1. This amendment formally abolished slavery within the United States by prohibiting individual states from enacting legislation authorizing the use of slavery within their borders. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439, 20 L. Ed. 2d 1189, 88 S. Ct. 2186 (1968) (noting that the Thirteenth Amendment effectively abolished slavery and gave Congress the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States") (internal quotations omitted). Congress then ratified the Fourteenth Amendment on July 9, 1868, declaring among other things, that all persons born or naturalized in the United States were United States citizens and citizens in the state in which they resided. *See* U.S. Const. amend. XIV, § 1. Section 1 of this Amendment effectively overruled the Supreme Court's *Dred Scott* [24] decision, ultimately making freed slaves citizens of the United States. Finally, on February 3, 1870, Congress ratified the Fifteenth Amendment with the intention of granting African-Americans the right of suffrage.[25] The Fifteenth Amendment provides, in part: "The

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[24] In *Dred Scott v. Sanford*, the Supreme Court declared the Missouri Compromise unconstitutional and broadly held that slaves were property, not citizens. 60 U.S. 393 (1865). The Court's ruling established that slaves were not entitled to all of the rights, privileges and immunities guaranteed to all citizens under the Constitution. *Id.* at 404-405.

[25] The court notes that although Congress intended to give African-Americans the right to vote by ratifying the Fifteenth Amendment, the Amendment itself did not guarantee such a result. State and local laws requiring poll taxes, literary tests, residence and registration requirements, and "grandfather clauses" acted as

right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on the account of race, color, or previous condition of servitude." U. S. Const. amend XV, § 1. Concerned with the possibility that individual states may attempt to circumvent the purpose behind the Civil War Amendments, Congress included an enabling clause in all three of the Civil War Amendments – giving it the exclusive power to enforce the Amendments with appropriate legislation. *See* U.S. Const. amend XIII, § 2; *see also* U.S. Const. amend XIV, § 5; U.S. Const. amend XV, § 2.

More directly on point, the Representative Branches considered the issue of reparations to freed slaves for harms suffered as a result of the institution of slavery.[26]

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impediments to this right. See Blaustein and Zangrando, *supra* at 245-46. Many of these issues were not resolved until decades later when the United States Supreme Court became involved in the issue and Congress passed the Voting Acts Rights Act of 1965. *Id.* However, to help illustrate the seriousness of Congress' efforts to assimilate the newly freed slaves into society, the court notes that the African-American male was given the right to vote fifty years prior to Congress' ratification of the Nineteenth Amendment, which gave women the right to vote. *See* U.S. Const. amend. XIX.

[26] In fact the Representative Branches continue to consider the issue of reparations to descendants of slaves. In 1989, and in each successive year, Congressman John Conyers has introduced a Reparations Study Bill, commonly referred to as H.R. 40. *See, e.g.,* Commission to Study Reparations Proposals for African Americans Act, H.R. 3745, 101st Cong. (1989); Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 108th Cong. (2003). This Reparations Study Bill provides, *inter alia,* for the formation of a commission to study human chattel slavery and its continuing impact on African descendants in the

Congressman Thaddeus Stevens proposed a bill that would have utilized the Confiscation Acts to seize public and private real property within the former Confederate States. *See* H.R. 29, 40th Cong. § 1, 2 (1867). The confiscated property would have been distributed to freed slaves. *See id.* § 4. Specifically, the text of that bill provided, *inter alia:*

> That out of the lands thus seized and confiscated the slaves who have been liberated by the operations of the war and the amendment to the Constitution or otherwise, who reside in said "confederate States" on the 4th day of March, A.D. 1861, or since, shall have distributed to them as follows, namely: to each male person who is the head of a family, forty acres; to each adult male, whether the head of a family or not, forty acres; to each widow who is the head of a family, forty acres -- to be held by them in fee-simple, but to be inalienable for the next ten years after they come seized thereof.

Id. In addition, each freed slave would have also been entitled to a monetary grant for the purpose erecting buildings on these distributed lands. *See id.* § 5.

Stevens passionately advocated for passage of this bill. Stevens indicated that H.R. 29 was designed to help several classes of persons, including freed slaves, stating:

United States today. *See, e.g.*, H.R. 3745, § 2(b)(1)-(3), 101st Cong. (1989). The bill also calls for the commission to recommend the form that reparations should take if it indeed finds there to be continuing injuries to African descendants. *See id.* at § 2(b)(5).

> [H.R. 29] is important to four millions of injured, oppressed, and helpless men, whose ancestors for two centuries have been held in bondage and compelled to earn the very property a small portion of which we propose to restore to them, and who are now destitute, helpless, and exposed to want and starvation under the deliberate cruelty of their former masters . . . . The cause of the war was slavery. We have liberated the slaves. It is our duty to protect them and provide for them while they are unable to provide for themselves. Have we not a right, in the language of Vattel, 'to do ourselves justice respecting the object which has caused the war,' by taking lands for homesteads for these 'objects' of the war?

Cong. Globe, 40th Cong., 1st Sess. 204 (1867) (statement of Congressman Stevens). According to Stevens, passage of H.R. 29 would have served two objectives. First, the bill would have served to punish the Confederate States for their treasonous war. As Stevens stated: "You hold at your feet a conquered foe, an atrocious enemy. Tell him on what terms he may arise and depart or remain loyal. But do not embrace him too hastily. Be sure first that there is no dagger in his girdle." *Id.* at 205. Second, the bill would have served to place freed slaves on the path to economic independence. As Stevens stated:

> Four million people have just been freed from a condition of dependence, wholly unacquainted with business transactions, kept systematically in ignorance of all their rights and of the common elements of education, without which none of any race are competent to earn an honest living, to guard against the frauds which will always be practiced on the

> ignorant, or to judge of the most judicious manner of applying their labor.

Id.

In the Senate, Senator Charles Sumner also championed this vision of land distribution as a form of reparations to freed slaves. *See* Cong. Globe, 40th Cong., 1st Sess. 15, 49-56, 79, 114, 147, 203-08, 304-08, 463 (1867) (statements of Senator Sumner). According to Sumner, "all who are now familiar with the process of reconstruction have felt that our work would be incomplete unless in some way or another we secured to the freedmen a piece of land." Cong. Globe, 40th Cong., 1st Sess. 50 (1867) (statement of Senator Sumner). One particular proposed resolution of Sumner's provided, *inter alia:* "Not less important than education is the homestead, which must be secured to the freedmen, so that at least every head of a family may have a piece of land." *Id.* (reading text of proposed resolution, Miscellaneous Document No. 1, § 5).

The idea of land distribution was also a plan of the Bureau of Refugees, Freedmen, and Abandoned Land. *See generally* Bentley, *supra* at 49. However, the idea of land distribution was ultimately abandoned, with President Andrew Johnson pursuing a plan to pardon Confederate sympathizers and restore their property rights. *See* Claude F. Oubre, *Forty Acres and a Mule: The Freedmen's Bureau and Black Land Ownership* 61 - 71 (1978).

The words of Senator Sumner, lamenting the decision not to extend monetary or property reparations to freed slaves, is hauntingly prophetic of the continued post-Emancipation reparations movement: "I do not like to play the part of

Cassandra; [27] but I cannot forbear declaring my conviction that we shall regret hereafter that we have not done more." Cong. Globe, 40th Cong., 1st Sess. 165 (1867) (statement of Senator Sumner). Yet, that does not change the fact that the Representative Branches considered the issue of reparations to former slaves, and the chosen vessels of reparations came in the form of constitutional and legislative enactments guaranteeing equality under the law and freedom from discrimination. It is the political question doctrine that militates that this court attribute finality to those decisions, and not posit itself as the ultimate authority on the issue by second guessing those decisions. *See Baker*, 369 U.S. at 210. It is not the province of this court to say that more could have been done in the past; as such decisions are in the nature of political questions committed to the Representative Branches.

In conclusion, based on the historical record presented here, it is clear that both during and after the Civil War the issue of reparations to former slaves was one committed to the Representative Branches of the federal government. It was the President and Congress who prosecuted the military and political aspects of the Civil War, ultimately leading to the conclusion of the war. With a goal of preserving the Union and securing an acceptable and lasting peace, it again was the President and Congress who chose to amend the Constitution and enact civil rights legislation in an effort to provide legal equality to the newly freed slaves. Although the Representative Branches decided to take this particular course of conduct in lieu of providing reparations to former slaves, the historical record clearly demonstrates that the Constitution commits this decision to the Representative Branches. *See*

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[27] In Greek mythology, Cassandra was a figure endowed with the gift of prophecy but fated never to be believed.

Alperin v. Vatican Bank, 242 F. Supp. 2d 686, 692 (N.D. Cal. 2003) (noting that "a court must consider the totality of the circumstances in determining whether a claim is one committed to the political branches for resolution"). By requiring the court to second-guess the decisions of the Representative Branches made more than a century ago, Plaintiffs' Complaint presents a non-justiciable political question. *See Cato,* 70 F.3d at 1110 (affirming the dismissal of plaintiffs' slavery reparations complaint on political question grounds based on Congress' desire "to prevent judicial second guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort") (internal quotations and citations omitted).

(2). Judicially Discoverable and Manageable Standards

There also exists a lack of "judicially discoverable and manageable standards" for resolving Plaintiffs' claims in this case. *Baker,* 369 U.S. at 217. Defendants argue, and the court agrees, that the historical issues raised in Plaintiffs' Complaint "involve too broad a span of conduct over too broad an expanse of time to be susceptible to any manageable judicial standards for resolution." *See* Defs.' Joint Mot. to Dismiss, at 35. As stated in the Complaint, the relevant events took place as far back as the year 1619. *See* FACC P9. Absent a political framework, the court is ill-equipped to determine many issues posed in a dispute covering a period of almost 400 years. This includes, for example, determining such issues as consanguinity and apportionment of liability given the multiple generations associated with the litigation. *See, e.g.,* Eric A. Posner and Adrian Vermeule, *Reparations For Slavery and Other Historical Injustices,* 103 Colum. L. Rev. 689, 702 (2003) (discussing the limited effect of the

restitutionary theory of reparations where the claim is made several generations removed from the actual wrongdoing).

In support of their claims, Plaintiffs rely on *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000), to support their assertion that this type of case is "extremely well suited to judicial resolutions." *See* Pls.' Resp. to Def.'s Mot. to Dismiss, at 30 n.47; *see also* Pls.' Sur-reply Br., at 6 n.20. In the *Holocaust Victim* case, the district court approved a class action settlement between Holocaust victims and two leading Swiss banks after the plaintiffs brought suit alleging, among other things, that the defendants "collaborated with and aided the Nazi regime in furtherance of war crimes, crimes against humanity, crimes against peace, slave labor and genocide." 105 F. Supp. 2d at 141. However, the *Holocaust Victim* case is clearly distinguishable from the present action because in its opinion, the court noted that because the settlement was reached while the defendants' motions to dismiss were pending, the court did not have to decide the issues raised in the motions. *Id.* at 142. Thus, the *Holocaust Victim* court never considered whether the issues raised in the plaintiffs' complaint implicated a non-justiciable political question.

Moreover, although it can be argued that in certain cases such issues similar to those presented in Plaintiffs' Complaint are not entirely inappropriate for judicial resolution, this case is not one of them. Because the events surrounding the institution of slavery and the Civil War are so deeply rooted in our Nation's history, the issues that may appear to be capable of judicial resolution in an ordinary case move beyond the province of this court given the magnitude of the events that preceded them. *Cf. Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d at 389 (stating that the magnitude of World War II has placed Plaintiffs' claims for

reparations beyond the province of judicial determination and "into the political realm").

Ultimately, the court is persuaded by the reasoning adopted by other courts that have considered the issue in the context of reparations for forced labor during World War II and have held that such claims are not suitable for judicial resolution. *See, e.g., Kelberine,* 363 F.2d at 995; *Iwanowa,* 67 F. Supp. 2d at 489; *Burger-Fischer,* 65 F. Supp. 2d at 283-84; *Alperin,* 242 F. Supp. 2d at 695; *Anderman v. Federal Republic of Austria,* 256 F. Supp. 2d 1098, 1115 (C.D. Cal. 2003). In *Kelberine*, while discussing whether a private corporation should be liable for its involvement in the Nazi conspiracy of 1933-45, the Appeals Court for the D.C. Circuit stated:

> We are of the opinion the thesis is not presently susceptible of judicial implementation. It may be that the Congress might enact a program and a procedure by which the objectives prayed for could be achieved. But we think the courts alone cannot do it. As presently framed, the problem is not within the established scope of judicial authority . . . . The span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tortfeasors is too indefinite. The procedure sought – adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power – is too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed. . . . The events, the witnesses, the guilty tortfeasors, their membership in the conspiracy are all so potentially vague at this point as to pose an

> insoluble problem if undertaken by the courts without legislative or executive guidance, authorization or support. The whole concept is too uncertain of legal validity to sustain the self-establishment of the proceedings by a court in the absence of specific legislative or executive formulation.

Id.

The issues raised by the *Kelberine* court, particularly those relating to the impracticality of judicially resolving disputes covering vast time periods and containing numerous unidentifiable tortfeasors, are clearly present in the underlying litigation. Although Plaintiffs attempt to distinguish the World War II reparation cases from their case, many of the issues raised in *Kelberine* and its progeny are plentiful in the underlying litigation. As such, the second *Baker* factor also requires dismissal of Plaintiffs' Complaint.

(3). Remaining Baker Factors

As stated above, the issues raised in Plaintiffs' Complaint involve events that have had a significant impact on our Nation's historical development. *See supra* Part IV.A.2.b.(1). Both during and after the Civil War, the Representative Branches implemented various policies aimed at resolving the problems and challenges stemming from the abolition of slavery within the United States. These policies included, among others, the enactment of several Civil Rights Acts and the ratification of the Civil War Amendments – all of which were intended to provide legal equality to the newly freed slaves. Even throughout the twentieth century, the Representative Branches continued to establish these policies by enacting further civil rights legislation and by

implementing various relief programs intended to benefit minorities – many of whom are descendants of former slaves. By bringing their claims for slavery reparations before the court, Plaintiffs require the court to criticize or question actions or decisions or policies made by the Representative Branches over a period spanning more than a century. Given our constitutional structure, policy determinations of this type are for elected officials, not the courts. Moreover, during and after the bloodiest war in this country's history, the Representative Branches grappled with these issues while simultaneously trying to conclude the war and ensure lasting peace. Allowing Plaintiffs, through private litigation, to seek reparations for wrongs committed prior to and during the Civil War clearly expresses a lack of respect for the Representative Branches and their attempted resolution of such issues over the past century and one-half.[28] Although Plaintiffs question the choices made by the Representative Branches and the effectiveness of these decisions in providing equality to descendants of former slaves, the fact remains that these are political questions which the court must decline to determine. *Cf. Burger-Fischer,* 65 F. Supp. 2d at 282

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[28] Plaintiffs argue that President Bush recently gave "implicit support" for their claims in a major policy speech given on Goree Island in Senegal on July 8, 2003, where he declared slavery as "one of the greatest crimes in history." *See* Pls.' Resp. to Defs.' Mot. to Dismiss, at 31. Plaintiffs fail to develop this argument or support it in any way. *See United States v. Jones,* 224 F.3d 621, 626 (7th Cir. 2000) (stating that courts should not consider undeveloped or unsupported arguments). In any event, Plaintiffs' use of the President's speech is not persuasive because such statements may support the proposition that the Representative branches of our government should continue their historical efforts to advance civil rights for all citizens.

(concluding that courts cannot re-examine the adequacy of reparation agreements between the United States and other World War II combatants because doing so implicates a political question in which the court must decline to determine).

c. Conclusion

In sum, the issues raised in Plaintiffs' Complaint implicate all of the factors established by the Supreme Court identifying a non-justiciable political question. *See Baker,* 369 U.S. at 217. As such, each *Baker* factor provides a separate and independent basis for the court to dismiss Plaintiffs' Complaint under the well-settled political question doctrine. *See id.*

B. Failure to State a Claim Upon Which Relief Can be Granted

As discussed *supra,* one of the fundamental defects of Plaintiffs' Complaint is lack of standing, as the Complaint fails to allege any constitutionally cognizable injury that is fairly traceable to Defendants. As an additional argument in support of dismissal, Defendants argue that Plaintiffs' Complaint fails to state a claim upon which relief can be granted. Although the court has dispositively determined that Plaintiffs lack standing to bring the claims raised in their Complaint, and that these claims present a non-justiciable political question, with an abundance of caution, the court will next determine whether the Complaint fails to state a claim upon which relief can be granted as an independent basis for dismissal.

The sufficiency of a complaint may be tested in a number of ways pursuant to Federal Rule of Civil Procedure 12: a

motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6); a motion for a more definite statements of a vague or ambiguous complaint pursuant to Rule 12(e); or a motion to strike redundant, immaterial, impertinent or scandalous matter in a complaint pursuant to Rule 12(f). In this matter, Defendants have elected to proceed pursuant to Rule 12(b)(6), challenging whether Plaintiffs' Complaint states a claim upon which relief can be granted.

Pursuant to Federal Rule of Civil Procedure 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Pro. 8(a)(2); *see also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 168, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993) (discussing "notice pleading" standards under the Federal Rules of Civil Procedure). Under this liberal notice pleading standard, "'[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 514, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002) (quoting *Hishon v. King & Spalding,* 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)).

The main function to be performed by the complaint is to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). "While federal notice-pleading allows for a generous reading of a complaint, in order to resist a motion to dismiss, the complaint must at least set out facts sufficient to 'outline or adumbrate' the basis of the claim." *Panaras v. Liquid Carbonic Industries Corp.,* 74 F.3d 786, 792 (7th Cir. 1996). The Federal Rules of Civil Procedure require the plaintiff to disclose adequate information regarding the basis of the claim

for relief as distinguished from a bare averment that the plaintiff wants relief and is simply entitled to it. *See* 5 Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 1202 (2d ed. 1990). A complaint contains adequate information regarding the basis of the claim for relief if it contains even "the bare minimum facts necessary to put the defendant on notice of the claim so that he can file an answer." *Higgs v. Carver,* 286 F.3d 437, 439 (7th Cir. 2002). To provide a defendant with fair notice, "a complaint must allege facts bearing on all material elements necessary to sustain a recovery under some viable legal theory." *Looper Maintenance Service, Inc. v. City of Indianapolis,* 197 F.3d 908, 911 (7th Cir. 1999) (citation omitted).

Plaintiffs claim that Defendants illegally profited from slavery without identifying the act or acts claimed to support this broad charge. This is insufficient to state a claim even under liberal notice-pleading standards. *See Higgs,* 286 F.3d at 439. As already indicated, Plaintiffs' Complaint fails to connect any alleged injury of any one of the Plaintiffs or their ancestors to alleged conduct by any one of the Defendants or their predecessors. Rather, Plaintiffs seek to hold Defendants liable for an entire era of history simply because their alleged predecessors were purportedly doing business in nineteenth century America. Plaintiffs' Complaint can be reduced to the following syllogism: Defendants or their predecessors allegedly profited from the unpaid labor of former slaves, and Plaintiffs are descendants of former slaves, therefore, Plaintiffs are entitled to some of Defendants' profits. However, the allegations in a complaint must be those relating to the plaintiff, not those of someone else. *See Kyle v. Morton High School,* 144 F.3d 448, 455 (7th Cir. 1998). The broad allegations of Plaintiffs' Complaint fail to give Defendants fair notice of what conduct is alleged to have injured which

persons, in what manner, and when over the past four centuries covered in the Complaint.

In light of this omission failing to link any alleged conduct of Defendants or their alleged predecessors to Plaintiffs or their ancestors, Plaintiffs' Complaint relies on a conspiracy theory. Plaintiffs' Complaint alleges that Defendants or their alleged predecessors conspired with certain unnamed malefactors to violate the legal rights of certain unnamed victims – presumably all persons held in slavery – and thus are somehow liable based on a theory of third-party liability. However, Plaintiffs' Complaint fails to allege even the faintest outline of this conspiracy, let alone its members and Defendants', or their predecessors', alleged roles in that conspiracy. Even under liberal notice pleading standards, the pleading of a conspiracy requires a plaintiff to "indicate the parties, general purposes, and approximate date, so that the defendant has notice of what he is charged with." *Walker v. Thompson,* 288 F.3d 1005, 1007 (7th Cir. 2002). Plaintiffs' conspiracy theory is similar to that in *Albiero v. City of Kankakee,* 122 F.3d 417, 420-21 (7th Cir. 1997), where the plaintiffs alleged a conspiracy, but did not elaborate or provide any other allegations to support the conspiracy.

Plaintiffs' Complaint fails to meet the notice pleading requirements set forth in the Federal Rules of Civil Procedure. "This is not a case where the plaintiff has been tripped up by 'mere technicalities,' but rather, the plaintiff has omitted the gravamen of his complaint." *Kyle,* 144 F.3d at 457. Plaintiffs' Complaint is a pastiche of the generally acknowledged horrors of slavery, totally devoid of allegations of injury to the Plaintiffs or corresponding conduct committed by Defendants. "This glaring gap in the complaint leaves total speculation as the only alternative for the court to come up with any set of facts justifying relief." *Id.* at 454. Defendants cannot be

deemed to have fair notice of Plaintiffs' claims when they are based solely on speculation. Further, the court cannot indulge this speculation and attempt to determine whether Plaintiffs' Complaint could set forth any set of facts justifying relief, as "that is not the court's job." *Id.* In short, Plaintiffs fail to present a well-pleaded complaint that can withstand scrutiny under Rule 12(b)(6), even under liberal notice pleading standards.

C. Statutes of Limitation

As an additional argument in support of dismissal, Defendants argue that Plaintiffs' claims are time-barred by operation of various statutes of limitation. Once again, although the court has dispositively determined that Plaintiffs lack standing to bring the claims raised in their Complaint, that these claims present a non-justiciable political question, and fail to state a claim upon which relief can be granted, with an abundance of caution, the court will also determine whether statute of limitations defenses would also constitute an independent basis for dismissal.

1. Overview of Statutes of Limitation

The concept of limitations periods to the bringing of legal action has been well-established in the law for centuries. Limitations on actions can be traced back to early Roman law. See *Developments in the Law: Statutes of Limitations* 63 Harv. L. Rev. 1177 (1950) (citing Sohm, *The Institutes of Roman Law* 318-22 (Ledlie's trans., 3d ed. 1907)). As part of our Anglo-American common law system of law, statutes of limitations can be traced as far back as 1189 for actions concerning property right disputes. *See* Thomas E. Atkinson, *Some Procedural Aspects of the Statute of Limitations,* 27 Colum. L. Rev. 157, 162 (1927) (chronicling the history of

statutes of limitations). While the concept of statute of limitations has evolved over the centuries well beyond the realm of property law, the general principles behind them remain the same.

One principle behind statutes of limitations is the promotion of justice. In his work *The Path of the Law,* Oliver Wendell Holmes reflected on statutes of limitations, asking: "What is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?" Oliver W. Holmes, Jr., *The Path of the Law,* 10 Harv. L. Rev. 457, 476 (1897).[29] To answer Holmes' question, the justification is fairness to litigants. This fairness is achieved through two goals of statutes of limitations: first, to provide the defendant notice of the plaintiff's claims; and second, to provide repose to the defendant. "Statutes of limitations . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses disappeared." *Order of Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 348-49, 88 L. Ed. 788, 64 S. Ct. 582 (1944). Statutes of limitations are based on "the theory that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Id.* at 349.

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[29] Also reflecting on the purposes served by statutes of limitation, the Supreme Court once stated: "Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law." *Chase Sec. Corp. v. Donaldson,* 325 U.S. 304, 313, 89 L. Ed. 1628, 65 S. Ct. 1137.

The Supreme Court has further elucidated on that point, stating that:

> Statutes of limitations find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. [citation omitted] They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what is now called a 'fundamental' right or what used to be called a 'natural' right of the individual. [Plaintiffs] may, of course, have the protection of the policy while it exists, but the history of pleas of limitations shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314, 89 L. Ed. 1628, 65 S. Ct. 1137 (1945).

The procedural requirements established by various legislatures for gaining access to the courts are not to be disregarded out of a vague sympathy for particular litigants. *See National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 122 S. Ct. 2061, 2071, 153 L. Ed. 2d 106 (2002) (citing *Baldwin County Welcome Center v. Brown,* 466 U.S. 147, 152, 80 L. Ed. 2d 196, 104 S. Ct. 1723 (1984)). "Statutes of

limitations are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application." *Cada v. Baxter HealthCare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990). Statutes of limitations are regulations set by the legislature, designed to set a time period in which to file an action. "They protect important social interests in certainty, accuracy, and repose." *Id.* "Though rarely the subject of sustained scholarly attention, the law concerning statute of limitations fairly bristles with subtle, intricate, and often misunderstood issues . . . ." *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 849 (7th Cir. 1996).

Two important concepts when dealing with statutes of limitation are accrual and tolling. Accrual denotes the point in time when an action can be maintained. "A cause of action 'accrues' when a suit may be maintained thereon, and the law in this regard differs from state-to-state and by nature of action." *Deluxe Black's Law Dictionary,* 6th edition at 21 (1990). The proverbial clock starts to run when the action accrues. It is not the date on which the wrong that injures the plaintiff occurs, but the date – often the same, but sometimes later – on which the plaintiff discovers that he has been injured. While discovery of the injury in some cases may be complex, in others it would be immediately obvious, as in the case of the brutal application of the lash, the turning of the screw, or the tightening of the leg chains nightly to a post. In a complement to accrual, tolling is a concept which suspends the running of a limitations period to an accrued action. The proverbial clock is stopped when the action is tolled.

2. Statutes of Limitations as Applied to Plaintiffs' Claims

Since statutes of limitations are defenses to claims, a plaintiff ordinarily need not anticipate or attempt to defuse these defenses in a complaint. *See Gomez v. Toledo,* 446 U.S. 635, 640, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980). However, "[a] litigant may plead itself out of court by alleging (and thus admitting) the ingredients of a defense . . . ." *United States Gypsum Co. v. Indiana Gas Co., Inc.,* 350 F.3d 623, 626 (7th Cir. 2003) (citation omitted); *see also Bennett v. Schmidt,* 153 F.3d 516, 518 (7th Cir. 1998) ("Litigants may plead themselves out of court by alleging facts that establish defendants' entitlement to prevail."); *Soo Line R.R. Co. v. St. Louis S.W. Ry. Co.,* 125 F.3d 481, 483 (7th Cir. 1997) (indicating that a "plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts").

The allegations of Plaintiffs' Complaint do allege the ingredients of a statute of limitations defense. Plaintiffs allege that their claims arise out of the institution of human chattel slavery as it existed in America, and admit that "many of the torts set out in the instant complaint occurred prior to the formal end of chattel slavery in the United States of America," which occurred in 1865. FACC P237. Plaintiffs also claim that these injuries are recurring as long as Defendants do not provide a proper accounting of the profits allegedly gained by them or their predecessors throughout the years from commercial activities relating to the institution of slavery.

Plaintiffs' claims fall into three groups: common law claims, state statutory claims, and federal statutory claims.[30] Plaintiffs' common law claims include: Count I, conspiracy; Count II, accounting; Count V, intentional infliction of emotional distress, Count VI, conversion; and Count VII, unjust enrichment. Plaintiffs' state statutory claims, included in Counts X through XIV, allege a violation of consumer protection laws for Illinois, Louisiana, Texas, New Jersey, and New York.

In the Motion to Dismiss, Defendants point to the law of Illinois as an example to show that Plaintiffs' state common claims are time-barred by many years, and extrapolate that Plaintiffs' claims would also be time-barred under any conceivable choice of law analysis using the law of any given state. Plaintiffs fail to object to Defendants' argument, and do not argue that there is any material conflict among the various state choice of law principles that could be applied in this case. Therefore the statute of limitations for Plaintiffs' other claims are as follows:

. **Conspiracy – three years.** *See, e.g., People v. Peebles,* 120 Ill. App. 3d 376, 457 N.E.2d 1318,

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[30] The court notes that neither Plaintiffs nor Defendants engage in a choice of law analysis. As to Plaintiffs' state law claims, the court normally would apply the choice of law principles of the state in which each transferor court sits. *See Ferens v. John Deere Co.*, 494 U.S. 516, 518-19, 108 L. Ed. 2d 443, 110 S. Ct. 1274 (1990) (indicating that in actions transferred pursuant to 28 U.S.C. § 1407(a), the transferee court applies the choice of law principles of the state where the transferor court sits for an analysis of state law claims). The court notes that the vagueness of Plaintiffs' Complaint prevents a thorough choice of law analysis.

1322, 75 Ill. Dec. 759 (Ill.App. Ct. 1983); 720 Ill. Comp. Stat. 5/3-4 (2003).

. **Accounting – five years.** *See, e.g., Schlossberg v. Corrington,* 80 Ill. App. 3d 860, 400 N.E.2d 73, 76, 35 Ill. Dec. 936 (Ill.App. Ct. 1980); 735 Ill. Comp. Stat. 5/13-205 (2003).

. **Intentional Infliction of Emotional Distress – two years.** *See, e.g., Dahl v. Fed. Land Bank Ass'n. of W. Ill.,* 213 Ill. App. 3d 867, 572 N.E.2d 311, 314, 157 Ill. Dec. 242 (Ill.App. Ct. 1991).

. **Conversion – five years.** *See, e.g., Bontkowski v. Smith,* 305 F.3d 757, 763 (7th Cir. 2002); 735 Ill. Comp. Stat. 5/13-205 (2003).

. **Unjust Enrichment – five years.** *See, e.g., Burns Philp Foods, Inc. v. Cavalea Cont'l Freight, Inc.,* 135 F.3d 526, 527 (7th Cir. 1998); 735 Ill. Comp. Stat. 5/13-205 (2003).

. **Texas Deceptive Trade Practices and Consumer Protection Act, *Tex. Bus. & Com. Code Ann. § 17.41* (2002) – two years.** *See* Tex. Bus. & Com. Code Ann. § 17.565 (2002).

. **Illinois Consumer Fraud and Deceptive Business Act, 815 Ill. Comp. Stat. 505/1 (2003) -- three years.** *See, e.g.,* 815 Ill. Comp. Stat. 505/10a(3) (2003); *Dreisilker Elec. Motors, Inc. v. Rainbow Elec. Co.,* 203 Ill. App. 3d 304, 562 N.E.2d 970, 972-3, 150 Ill. Dec. 167 (Ill.App. Ct. 1990).

. **New York Consumer Protection from Deceptive Acts and Practices Laws, N.Y. Gen. Bus. Law §§ 349, 350 -- three years.** *See, e.g., Soskel v. Handler,* 189 Misc. 2d 795, 736 N.Y.S.2d 853, 855 (N.Y. Sup. Ct. 2001).

. **New Jersey Unfair Trade Practice Law,** *N.J. Stat. Ann.* § *56:8-1* (2003) -- **six years.** *See, e.g., Mirra v. Holland Am. Line,* 331 N.J. Super. 86, 751 A.2d 138, 140 (N.J. Super. Ct. App. Div. 2000).

. **Louisiana Unfair Trade Practices and Consumer Protection Law,** La Rev. Stat. Ann. § 51:1401 (2003) -- **one year.** *See* La. Rev. Stat. Ann. § 51:1409(E) (2003).

Plaintiffs' federal statutory claims include: Count IV, piracy; and Count VIII, 42 U.S.C. § 1982. Although there is a five year statute of limitation on Plaintiff's piracy claim, *see* 18 U.S.C. § 3282 (2000), Plaintiffs' claim for piracy does not provide a private right of action, and need not be considered further.[31] The statute of limitations for violations of 42 U.S.C. § 1982 is two years. *See Honorable v. Easy Life Real Estate Sys., Inc.,* 182 F.R.D. 553, 563 (N.D. Ill. 1998).

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[31] Although Plaintiffs attempt to assert a claim for piracy, there is no private right of action for this claim, only criminal. See 18 U.S.C. § 1585; *see also Karahalios v. National Federation of Federal Employees. Local 1263,* 489 U.S. 527, 532-33, 103 L. Ed. 2d 539, 109 S. Ct. 1282 (1989) (citing *Transamerica Mort. Advisers, Inc. v. Lewis,* 444 U.S. 11, 19, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979)) (indicating that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies).

Plaintiffs argue that their remaining claims: Count III, crimes against humanity, and Count IX, the Alien Torts Claims Act ("ATCA"), which is plead in the alternative, do not have statutes of limitation. As for Plaintiffs' claim for crimes against humanity, the court need not address the issue of the statute of limitations regarding it because it is presented as merely a melange in which Plaintiffs fail to identify a claim which is actionable.[32] As for the ATCA, it does not contain a statute of limitations. "Although the ATCA itself does not contain a statute of limitations, when a cause of action under federal civil law does not have a directly applicable limitations period, the Supreme Court has instructed that the court should not assume that no time limit for the cause of action was intended." *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001) (citing *Del Costello v International Bhd of Teamsters,* 462 U.S. 151, 158, 76 L. Ed. 2d 476, 103 S. Ct. 2281 (1983)).

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[32] Plaintiffs attempt to assert a private right of action against Defendants for slavery, as a crime against humanity, based on the doctrine of *jus cogens*. Plaintiffs contend that since slavery has been deemed a crime against humanity according to international law, the doctrine of *jus cogens* applies, making this claim enforceable against parties in the United States. There are only two bases for establishing a private right of action based on international law: (1) self-executing treaties and (2) express statutory grants. *See, e.g., Dreyfus v. Von Finck,* 534 F.2d 24, 29-31 (2d Cir. 1976). First, the United States is not a signatory to any international treaty declaring slavery a crime against humanity. Second, there is no United States statute establishing a private right of action for claims based upon slavery as a crime against humanity. Therefore, Plaintiffs cannot a assert a private claim for crimes against humanity.

Generally, in such situations, the court should apply the "most closely analogous statute of limitations under state law." *Del Costello,* 462 U.S. at 152; *Reed v. United Transp. Union,* 488 U.S. 319, 323-24, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989); *see also Jones v. R.R. Donnelley & Sons Co.,* 305 F.3d 717, 723 (7th Cir. 2002). However, as a narrow exception to the general rule, the court should apply the limitations period provided by an analogous federal law when it determines that either: (1) a rule from elsewhere in federal law provides a closer analogy than available state law; or (2) the application of the state limitations period "would frustrate or interfere with the implementation of national policies." *North Star Steel Co. v. Thomas,* 515 U.S. 29, 34, 132 L. Ed. 2d 27, 115 S. Ct. 1927 (1995) (citations and internal quotations omitted); *see also Papa v. United States,* 281 F.3d 1004, 1011-12 (9th Cir. 2002). Some federal courts that have considered the issue have held that the Torture Victim Protection Act of 1991 ("TVPA"), which contains a limitations period of ten years, provides the most analogous statute to the ATCA. *See, e.g., Deutsch v. Turner Corp.,* 324 F.3d 692, 717; *Iwanowa,* 67 F. Supp. 2d at 462; *Cabiri v. Assasie-Gyimah,* 921 F. Supp. 1189, 1195-96 (S.D.N.Y. 1996). Under this theory, the ATCA limitations period is also ten years. *See* 28 U.S.C. § 1350, note § 2(c). In this case, the court need not determine whether a state or federal law provides a more closely analogous statute to the ATCA. Plaintiffs have not provided, nor can the court find an analogous state tort statute with a limitations period longer than the ten years provided under the TVPA. Assuming that the limitations period is ten years, Plaintiffs contention that they (or their ancestors) were aliens of the United States prior to the ratification of the Fourteenth Amendment, which occurred on July 9, 1868, *see* FACC PP237-39, takes their claims back over a century.

Conceding that "many of the torts set out in the instant complaint occurred prior to the formal end of chattel slavery in the United States of America," Pls.' FACC, P237, these claims would have accrued by 1865 at the latest. The longest limitations period for any of Plaintiffs' claims is ten years, which would have run well over a century prior to the filing of the instant Complaint. If cognizable claims ever existed, those claims were owned by former slaves themselves, and became time-barred when the statutes of limitations expired in the nineteenth century. As such, Plaintiffs' century-old claims are barred by the statutes of limitation in every jurisdiction.

3. Doctrines to Extend Statute of Limitations Periods

Plaintiffs attempt to avoid having their claims deemed time-barred by arguing a number of doctrines. Specifically, Plaintiffs contend that all of the respective statute of limitations should be tolled based on either the discovery rule, the continuing violation doctrine, equitable estoppel, or equitable tolling. These four principles, in one way or another, allow a plaintiff to bring a claim that on its face falls outside the statute of limitations. Both the discovery rule and the continuing violations doctrine deal with when the accrual of a claim is established. In contrast, the doctrines of equitable estoppel and equitable tolling allow a plaintiff to assert a claim after it has accrued by tolling the respective statutes of limitation. However, as the court will discuss below, these doctrines cannot revive claims already barred by the statute of limitations.

a. Discovery Rule

The discovery rule postpones the beginning of a limitations period until such time as the plaintiff discovers the injury, or through reasonable diligence should have

discovered the injury. *See Cada,* 920 F.2d at 450. The discovery rule keeps a claim from accruing until the plaintiff knows or through reasonable diligence should have known of the injury. *See TRW Inc. v. Andrews,* 534 U.S. 19, 27, 151 L. Ed. 2d 339, 122 S. Ct. 441 (2001).

In support of their argument that the discovery rule should delay accrual of their claims, Plaintiffs argue that "[slaves] were not privy to the causes and extent of the harms they suffered." FACC P192. Specifically, Plaintiffs argue that "in their miserable condition which was a direct result of slavery . . ., although intimately familiar with their pitifully horrific condition, [they] were not aware of the nature of the investments, insurance policies, joint ventures and other schemes and conspiracies developed and utilized by these defendants . . . to profit from slavery." Pls.' Resp. to Defs.' Mot. to Dismiss, at 17.

In response, Defendants reiterate that Plaintiffs' Complaint fails to allege any act committed by any specifically named Defendant or their predecessors against any of the Plaintiffs or their ancestors. Further, Defendants argue that since the alleged injuries were known, or knowable, to Plaintiffs' ancestors over a century ago, the discovery rule is simply inapplicable in this case.

Plaintiffs are attempting to recover for injuries incurred by their ancestors over a century ago. Plaintiffs' ancestors knew or should have known that they were being brutalized and wrongfully forced to work for people, plantations, companies and industries without being compensated. If they did not know of their exact injury at the time it occurred, they certainly should have known of it after the Civil War, the passing of the Civil War Amendments, or even the Civil Rights Movement of the 1960s. Furthermore, there is

evidence that other former slaves were aware of their injuries and previously have attempted to recover for them well before this action was filed. *See, e.g., Johnson,* 45 App. D.C. 440, (evidencing a claim for slavery reparations nearly a century ago).

Plaintiffs' contentions would have the Court extend the statute of limitations indefinitely, or at least until all of the discovery Plaintiffs desire is completed. "By tying the start of the limitations period to a plaintiff's reasonable discovery of a pattern rather than to the point of injury or its reasonable discovery the [discovery] rule would extend the potential for most . . . cases well beyond the time when a plaintiff's cause of action is complete." *Rotella v. Wood,* 528 U.S. 549, 558, 145 L. Ed. 2d 1047, 120 S. Ct. 1075 (2000). The mere fact that Plaintiffs' ancestors did not know exactly how much profit was made off of their slave labor is not enough to establish the discovery rule. "The federal common law discovery rule does not permit the plaintiff to delay filing its lawsuit until all foreseeable harms arising from the injury are actually experienced, but only until the plaintiff discovers the predicate injury." *Brademas v. Indiana Housing Finance Authority,* No. 03-2210, 354 F.3d 681, 2004 U.S. App. LEXIS 291, 2004 WL 48163, *5 (7th Cir. Jan. 12, 2004). The predicate injury in this instance was the institution of slavery itself. Plaintiffs make a veiled attempt to tie the beginning of the statute of limitations period to the discovery of the damages that flowed from slavery, rather than the predicate injury itself. Again, the discovery doctrine only extends the statute of limitations until the predicate act is discovered, not until all discovery of its consequences is completed. *See Rotella,* 528 U.S. at 558. Therefore, the discovery rule, when applied in this instance, does not delay accrual of the claims alleged.

b. Continuing Violation Doctrine

The continuing violations doctrine, although slightly different from the discovery rule, allows the plaintiff to file an action when there is a continuous series of injuries stemming from the same injury. Under this doctrine, the statute of limitations is not tolled *per se,* but rather left open until a final injury has accrued. See *Heard v. Sheahan,* 253 F.3d 316, 319 (7th Cir. 2001). "The continuing violation doctrine allows a complainant to obtain relief for a time-barred act of discrimination by linking it with acts that fall within the statutory limitations period." *Filipovic v. K&R Exp. Systems, Inc.,* 176 F.3d 390, 396 (7th Cir. 1999) (citing *Selan v. Kiley, 969* F.2d 560, 564 (7th Cir. 1992)). Courts will then treat the series of acts as one continuous act ending within the limitations period. *See id.* The continuing violation doctrine is applicable only if it would have been unreasonable to expect the plaintiff to sue before the statute ran on the conduct. *See id.*; *see also Galloway v. General Motors Serv. Parts Operations,* 78 F.3d 1164, 1167 (7th Cir. 1996).

As a preliminary matter, Plaintiffs assert that the continuing violation doctrine should be applied solely to their cause of action for an accounting. *See* Pls' Resp. to Defs.' Joint Mot. to Dismiss, at 22. Plaintiffs assert that they are continually hurt because they have not received an accounting of the monies owed to them and their ancestors for work they did while enslaved, and that Defendants continue to profit from the revenue they earned from the labor of Plaintiffs' ancestors. In support of their argument that the discovery rule should delay accrual of their claims, Plaintiffs argue that Defendants' failure to provide a proper accounting of the profits allegedly gained by them or their predecessors throughout the years from commercial activities relating to the institution of slavery constitute a continuing violation. In

response, Defendants argue that Plaintiffs do not allege a continuing violation; rather, they are alleging a single event with purported continuing injuries.

With respect to this claim, the underlying injury concerns the denial of payments for the forced labor of Plaintiffs' ancestors. All of the other ills and consequences that flowed from this injury, no matter how dreadful, do not constitute new or continuing claims. They are merely the alleged effects of an injury that occurred over a century ago, and not a continuing series of acts. *See Diliberti v. United States,* 817 F.2d 1259, 1264 (7th Cir. 1987) (citing *Ward v. Caulk,* 650 F.2d 1144, 1147 (9th Cir. 1981) ("A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation."); *Oppenheim v. Campbell,* 187 U.S. App. D.C. 226, 571 F.2d 660, 662 (D.C. Cir. 1978) (plaintiff's claim accrues when he is "first harmed")). Plaintiffs also assert that Defendants' present day failure to produce an accounting of whether they profited from the slave trade constitutes a new and continuing violation. Again, Plaintiffs' assertions are incorrect. Plaintiffs' assertions are merely a veiled attempt to circumvent the statute of limitations for their underlying claims. Plaintiffs have not alleged any new unlawful conduct by Defendants; but have merely alleged a continuing adverse consequence of prior unlawful conduct. *See Diliberti,* 817 F.2d at 1264. Therefore, the continuing violation doctrine, when applied in this instance, does not delay accrual of the claims alleged.

c. Equitable Estoppel

Equitable estoppel allows a plaintiff to bring a cause of action after the statute of limitations has expired when the "'defendant takes active steps to prevent the plaintiff from suing on time.'" *Brademas,* No. 03-2210, F.3d , 2004

U.S. App. LEXIS 291, 2004 WL 48163, *5 (quoting *Sharp v. United Airlines, Inc.*, 236 F.3d 368, 372 (7th Cir. 2001)). The defendant can prevent the plaintiff from filing their claim on time either by telling them that they will not assert the statute of limitations as a defense or by fraudulently concealing the injury after the fact. *See Holmberg v. Armbrecht*, 327 U.S. 392, 396-97, 90 L. Ed. 743, 66 S. Ct. 582 (1946); *Brademas*, No. 03-2210, F.3d , 2004 U.S. App. LEXIS 291, 2004 WL 48163, *5 (citing *Sharp*, 236 F.3d at 372). "The 'granting of equitable estoppel should be premised on a defendant's improper conduct as well as a plaintiff's actual and reasonable reliance thereon.'" *Hentosh v. Herman M. Finch Univ. of Health Sci. / The Chicago Medical School*, 167 F.3d 1170, 1174 (1999) (quoting *Wheeldon v. Monon Corp.*, 946 F.2d 533, 537 (7th Cir. 1991)).

Plaintiffs do not assert, nor is there any indication that Plaintiffs failed to file their claims within the appropriate time limitations because Defendants promised not to plead the statute of limitations as a defense. Rather, Plaintiffs assert that they did not properly file their claims within the appropriate time frame because of Defendants' unwillingness to divulge information about their ties to slavery, and that Defendants actively mislead them – *i.e.*, fraudulent concealment. *See* FACC P198; Pls.' Resp. to Defs.' Mot. to Dismiss, at 23. Specifically, Plaintiffs assert that:

> (1) defendants withheld documents and information related to their illegal profits from slavery and/or lied about their participation in slavery; (2) the fact that the defendants benefitted from concealing the information and that the concealment was so complete, provides a sufficient basis to conclude that they were aware of the concealment; (3) plaintiffs did not know of the

> defendants conduct or illegal profits and therefore could not have known of the concealment and/or misrepresentation; (4) defendants in concealing the information knew that this concealment would protect them from accountability for their actions; (5) plaintiffs lack of knowledge was reasonable and in good faith given the nature of defendants' conduct and plaintiffs' conditions; and (6) clearly justice would not be served by allowing the defendants to benefit from their concealing behavior as measured against the extreme harm suffered by plaintiffs and their ancestors.

Pls.' Resp. to Defs.' Mot. to Dismiss, at 22. In response, Defendants argue that Plaintiffs fail to plead, let alone particularize, the required elements of equitable estoppel.

Plaintiffs have not asserted any facts alleging that any Defendant concealed information in a way that would have prevented Plaintiffs' ancestors from asserting their claims within the proscribed statute of limitations period. Plaintiffs do not allege that Defendants concealed the injury. In fact, the injury was not concealed, but rather quite obvious when inflicted. Plaintiffs merely make vague generalizations about Defendants and their perceived practices. Plaintiffs vague assertions are not enough to satisfy the requirements for equitable estoppel. *See Hentosh,* 167 F.3d at 1174; *see also Williamson v. Indiana Univ.,* 345 F.3d 459, 463 (7th Cir. 2003) (denying equitable tolling based on plaintiff's failure to present any evidence that defendant took active steps to prevent her from bringing her charge within the allotted time). Therefore, equitable estoppel, when applied in this instance, does not toll the statute of limitations.

d. Equitable Tolling

"Equitable tolling applies when a plaintiff, despite due diligence, is unable to obtain enough information to conclude that there is a basis for a claim." *Brademas,* No. 03-2210, F.3d , 2004 U.S. App. LEXIS 291, 2004 WL 48163, *5 (citing *Sharp,* 236 F.3d at 373). As distinguished from equitable estoppel, equitable tolling "permits a plaintiff to sue after the statute of limitations has expired if through no fault or lack of diligence on his part he was unable to sue before, even though the defendant took no active steps to prevent him from suing." *Singletary v. Continental Ill. Nat'l. Bank & Trust Co.,* 9 F.3d 1236, 1241 (7th Cir. 1993) (citing *Heck v. Humphrey,* 997 F.2d 355, 357 (7th Cir. 1993)); *see also Cada,* 920 F.2d at 451 (indicating that equitable tolling does not require a finding of any conduct on the part of the defendant). "Equitable tolling is frequently confused with both fraudulent concealment [equitable estoppel] on the one hand and with the discovery rule – governing, as we have seen, accrual – on the other hand." *Cada,* 920 F.2d at 451.

Equitable tolling "halts the running of the limitations period so long as the plaintiff uses reasonable care and diligence in attempting to learn the facts that would disclose the defendant's fraud or other misconduct." 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedures* § 1056, at 239 (3d. ed. 2002); *see also Cada,* 920 F.3d at 451. When dealing with equitable tolling between two innocent parties, "the negligence of the party invoking the doctrine can tip the balance against its application . . . ." *Jackson v. Rockford Housing Auth.,* 213 F.3d 389, 397 (7th Cir. 2000) (quoting *Cada,* 920 F.2d at 453). A plaintiff invoking equitable tolling to suspend the statute of limitations must bring suit within a reasonable time after he has obtained,

or by due diligence could have obtained, the necessary information.

Plaintiffs assert that in this instance the only relevant question as to equitable tolling is "whether the circumstances preventing the plaintiffs from gaining equal access to the justice system over the past decades are sufficiently extraordinary to justify application of the equitable tolling doctrine." Pls' Resp. to Defs.' Mot. to Dismiss, at 19. Plaintiffs base this assertion on the fact that they were only recently able to obtain the necessary information to assert their claims, as a result of the "uniquely catastrophic historical context from which their class is still seeking to advance and from which the defendants are still profiting." *Id.* at 20.

It is true that because of the institution of slavery, the Jim Crow laws, and the lingering bigotries and separatist views following the Civil War, African-Americans were obstructed from obtaining necessary information on their claims and in some instances access to the legal system. Nevertheless, Plaintiffs' ancestors knew of their injury at the time that it occurred. They knew, or should have known that they were wrongfully being forced to work without compensation, and that somebody was making a profit from their labor. Yet, neither Plaintiffs nor their ancestors ever asserted these claims in a court of law until now. Plaintiffs have not shown that they acted with all due diligence in attempting to obtain vital information about their claims, and assert them timely.

Plaintiffs' contentions fly in the face of numerous well-settled legal principles and history. African-Americans, as well as various other ethnic groups, have previously brought claims seeking reparations in one form or another, against both public and private entities. *See Johnson,* 45 App. D.C. 440; *see also Deutsch v. Turner Corp.*, 317 F.3d 1005, 1028-

29 (affirming dismissal of slave labor claims against private corporations as, *inter alia,* time-barred), *amended by* 324 F.3d 692; *Wolf v. F.R.G.,* 95 F.3d 536, 544 (dismissing claims against private defendant on standing grounds); *Kelberine,* 363 F.2d at 992 (dismissing on justiciability and statute of limitations grounds reparations claims for World War II era slave labor against private company); *In re Nazi Era Cases Against German Defendants Litig.,* 129 F. Supp. 2d at 389 (dismissing slave and forced labor claims as nonjusticiable); *Iwanowa,* 67 F. Supp. 2d at 424; *Burger-Fischer,* 65 F. Supp. 2d at 248. Plaintiffs merely make vague assertions and generalizations as to their claims and the state of the legal system. Plaintiffs' vague assertions and generalizations are not enough to toll the statute of limitations on their claims. Plaintiffs' Complaint is nothing more than an attempt to by-pass the various statutes of limitation by chronicling the social inequities and injustices that have befallen African-Americans as a result of slavery. But the statutes of limitations "are not to be disregarded by courts out of a vague sympathy for particular litigants." *Morgan,* 122 S. Ct. at 2071. Therefore, the doctrine of equitable tolling does not apply in this instance.

4. Conclusion

Plaintiffs' attempt to bring claims over a century old are barred by the statute of limitations. Plaintiffs have failed to assert any factual or legal basis for allowing them to proceed with their cause of action in light of when their claims accrued or with due diligence found that they would have accrued. Plaintiffs' attempt to avoid this legal reality by pleading vague factual generalities and chronicling the social and economic injustices that have befallen African Americans due to slavery. However, statutes of limitation serve to promote justice for litigants, *see Donaldson,* 325 U.S. at 314, which cannot be

disregarded out of vague sympathy for Plaintiffs and their claims. *See Morgan,* 122 S. Ct. at 2071. Therefore, the court finds that Plaintiffs' claims are barred by the statute of limitations.

V. CONCLUSION

It is beyond debate that slavery has caused tremendous suffering and ineliminable scars throughout our Nation's history. However, Plaintiffs' claims, as alleged in their Complaint, fail based on numerous well-settled legal principles. First, Plaintiffs' claims are beyond the constitutional authority of this court. Without alleging any specific connection between themselves and the named Defendants, Plaintiffs lack essential constitutional standing requirements to bring their claims. Second, prudential limitations prohibit the court from deciding such broad questions of social importance when such claims are brought on behalf of absent third parties, as Plaintiffs attempt here. Third, the long-standing and well-reasoned political question doctrine bars the court from deciding the issue of slavery reparations, an issue that has been historically and constitutionally committed to the Legislative and Executive branches of our government. Fourth, Plaintiffs' claims are untimely. Conceding that many of the torts alleged in the Complaint occurred prior to the formal end of slavery, Plaintiffs fail to show how any of these claims fall within the applicable statutes of limitation. Finally, under the rules of procedure which guide the federal judicial system, Plaintiffs' Complaint fails to state a claim upon which relief can be granted, a serious defect the court cannot overlook regardless how egregious the circumstances giving rise to the claims.

In summary, Plaintiffs' attempt to bring these claims more than a century after the end of the Civil War and the formal

abolition of slavery fails; this determination is consistent with the position taken by numerous courts which have considered the issue over the last century. Ultimately, the legal obstacles prohibiting judicial resolution of such claims cannot be circumvented by the courts. Moreover, from the onset of the Civil War until present, the historical record clearly shows that the President and Congress have the constitutional authority to determine the nature and scope of the relief sought in this case, not the courts. This is manifested in the signing of the Emancipation Proclamation; the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution; and the promulgation of over a century of civil rights legislation.

Some may view this ruling as a condonation of ancient wrongs. That view is wrong. To suggest that the lions have won again and that the court is impervious to the human suffering at the core of this case would be absurd. The reasonable prudent person will read this opinion with care. We strive, case by case, within an imperfect system of law, through human endeavors, towards the unattainable perfect justice we seek.

For the foregoing reasons, Defendants' Joint Motion to Dismiss brought pursuant to Federal Rules of Civil Procedure 12(b)(1)and (6) is granted without prejudice.

IT IS SO ORDERED.

CHARLES RONALD NORGLE, Judge

United States District Court

DATED January 26, 2004

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 04-1477

[Filed July 12, 2004]

By the Court:

IN RE: AFRICAN-AMERICAN SLAVE DESCENDANTS LITIGATION)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 02 C 2644, 03 C 2644

Charles R. Norgle, Sr., Judge.

ORDER

Contrary to this court's order of April 6, 2004, it does not appear that the district court issued an order regarding the complaint filed by plaintiffs Chester and Timothy Hurdle (case no. 03-C-2644, hereinafter the "*Hurdle* complaint").

A review of the papers filed in the district court reveals that the court had before it two complaints, the "First Consolidated and Amended Complaint" and the *Hurdle* complaint. While the "Joint Motion of Defendants to Dismiss the First Consolidated and Amended Complaint" also sought dismissal of the *Hurdle* complaint, *see* fn. 1 of defendants' motion, the district court's order of January 26, 2004, makes no reference to the *Hurdle* complaint and the claims raised in that complaint. Further, it appears that the *Hurdle* complaint is separate from the "First Consolidated and Amended Complaint"; the two complaints were not consolidated for all purposes. *See E.E.O.C. v. Harris Chernin, Inc.*, 10 F.3d 1286, 1289 (7th Cir. 1993) (if cases are consolidated in district court for limited purposes and retain separate identities, appellate jurisdiction depends only on the finality of the disposition in each separate case). As such, it appears that the *Hurdle* complaint remains pending before the district court, making this appeal premature. Accordingly,

IT IS ORDERED that appellants and appellees both shall file, on or before July 23, 2004, a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing shall be suspended pending further court order.

NOTE: Caption document "JURISDICTIONAL MEMORANDUM." The filing of a Circuit Rule 3(c) Docketing Statement does not satisfy your obligation under this order.